Supreme Court, U.S.
FILED
02 759 NOV 13 2002
OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

BLUE RIBBON PROPERTIES, INC.,
DOING BUSINESS AS LONG HOLLOW LANDFILL,
Petitioner,

v.

HARDIN COUNTY FISCAL COURT; HARDIN COUNTY, KENTUCKY; HARDIN COUNTY PLANNING AND DEVELOPMENT COMMISSION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

STANLEY W. WHETZEL, JR.
Counsel of Record
SUITE 3850, NATIONAL CITY TOWER
101 SOUTH FIFTH STREET
LOUISVILLE, KY 40202
(502) 582-1891

Counsel for Petitioner

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

QUESTIONS PRESENTED FOR REVIEW

1. A County denied a business investor's renewed application to develop property it had acquired in response to the County's request for a proposal to dispose of its solid waste. The County's action was based on a zoning ordinance previously declared invalid by the state courts in a suit brought by the business investor after the County denied its prior application. Was the County's action a compensable, regulatory taking of property under this Court's "takings" jurisprudence, especially *Pennsylvania Coal Company v. Mahon*, *Penn Central Transportation Company v. New York City*, and *Lucas v. South Carolina Coastal Council*, or a compensable taking under the State's "reverse" or "inverse" condemnation jurisprudence expressed in *Commonwealth of Kentucky, Natural Resources and Environmental Protection Cabinet v. Stearns Coal and Lumber Company*, and the takings and due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution, or Section 242 of the Kentucky Constitution?

2. A County invited private investor proposals to handle or dispose of its solid waste, and with the County's knowledge a business investor expended substantial capital to respond, including the acquisition of suitable land and the completion of tests necessary to establish its fitness for the proposed use. After all of these expenditures were made, the County denied the investor's application for a conditional use permit on the basis of a County zoning ordinance previously declared invalid in a suit brought by the same investor following its denial of the investor's earlier application. Was the County's destruction of the business investor's investment-backed interests a compensable, regulatory taking under this Court's "takings" jurisprudence, especially *Pennsylvania Coal Company v. Mahon*, *Penn Central*

Transportation Company v. New York City and *Lucas v. South Carolina Coastal Council*, or a compensable taking under the State's "reverse" or "inverse" condemnation jurisprudence as expressed in *Commonwealth of Kentucky, Natural Resources and Environmental Protection Cabinet v. Stearns Coal and Lumber Company*, and the takings and due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution, or Section 242 of the Kentucky Constitution?

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

PETITIONER

The Petitioner is Blue Ribbon Properties, Inc., a Kentucky corporation having its principal place of business in the Western District of Kentucky. Petitioner is unaware of any publicly-held company owning 10 percent or more of its stock. Petitioner was the Plaintiff in the District Court and the Appellant in the United States Court of Appeals for the Sixth Circuit.

RESPONDENTS

Respondents are the Hardin County Fiscal Court, Hardin County, Kentucky, a body politic, and the Hardin County Planning and Development Commission, Hardin County, Kentucky, a body politic, both of which are resident in the Western District of Kentucky. Respondents were Defendants in the District Court and Appellees in the United States Court of Appeals for the Sixth Circuit.

TABLE OF CONTENTS

Questions Presented For Review i

List of Parties to the Proceedings
In the Court Below iii

Table Of Contents iv

Table Of Authorities vii

Opinions Below 1

Statement Of Jurisdiction 2

Constitutional And Statutory Provisions Involved 2

Statement Of The Case And Facts 3

Reasons For Granting The Writ 10

I. This Court's Precedents Do Not Resolve This Case 12

II. Penn Central, Lucas and Tahoe-Sierra Support Petitioner's Takings Claim 13

III. The County's Arbitrary Conduct Deprived The Petitioner Of Its Investment 16

Conclusion 18

Appendix

Appendix A
Court of Appeals Opinion, 8/15/02 . . . . . 1a

Appendix B
District Court Memorandum Opinion, 8/28/00 . 21a

Appendix C
District Court Order, 8/28/00 . . . . . 29a

Appendix D
District Court Memorandum Opinion,
11/27/96 . . . . . 31a

Appendix E
District Court Order, 11/27/96 . . . . . 54a

Appendix F
Kentucky Supreme Court Order,
Nos. 95-SC-79-D and 95-SC-80-D, 5/31/95 . . 56a

Appendix G
Kentucky Court of Appeals Opinion, -
Nos 93-CA-1099-MR and 93-CA-1291-MR,
1/06/95 . . . . . 58a

Appendix H
Kentucky Court of Appeals Opinion,
No. 92-CA-2822-MR, 1/06/95 . . . . . 70a

Appendix I
Hardin Circuit Court Opinion and Summary
Judgment, 4/26/93 . . . . . 74a

Appendix J
Part 1, Hardin County Solid Waste Management Plan, 10/01/91, page 1081 . . . . . 98a

Appendix K
Part 2, Hardin County Solid Waste Management Plan, 1/01/93, revised 3/23/93, page 18 . . . . . 99a

TABLE OF AUTHORITIES

Cases:

Agins v. City of Tiburon,
447 U.S. 255, 260 (1980) 11

Blue Ribbon Properties, Inc. v. Hardin County Fiscal Court, Hardin County, Kentucky, et al.,
No. 91-CI-519 (April 26, 1993) 1, 2, 6

Commonwealth, Natural Resources and Environmental Protection Cabinet v. Stearns Coal and Lumber Co.,
678 S.W. 2d 378 (Ky. 1984) . . . . . i, ii, 14, 16

Hardin County Fiscal Court, et al. v. Blue Ribbon Properties, Inc.,
Nos. 93-CA-1099-MR and 93-CA-1291-MR,
(January 6, 1995) 1, 2

Hardin County, et al. v. Joan Jost, et al.
No. 92-CA-2822-MR (January 6, 1995) 2

Hardin County, et al. v. Joan Jost, et al.
897 S.W. 2d 592 (Ky. App. 1995) 2, 7

Lucas v. South Carolina Coastal Council,
505 U.S. 1003 (1992) . . . . . i, ii, 9, 13, 14, 17

Joan Jost, et al. v. Hardin County, et al.
Hardin Circuit Court Civil Action
No. 91-CI-1554 6

Penn Central Transportation Co. v. New York City,
438 U.S. 104 (1978) . . . . . i, 9, 12-17

Pennsylvania Coal Co. v. Mahon,
260 U.S. 393 (1922) . . . . . i, 12-14

Tahoe-Sierra Preservation Council, Inc. v.
Tahoe Regional Planning Agency,
___U.S. ___, 122 S. Ct. 1466, 152 L. Ed.
2d 517 (2002) 13, 14

Constitutional Provisions, Statutes and Regulations:

U.S. Constitution amend. V . . . . . i, ii, 2, 8, 15

U.S. Constitution amend. XIV, § 1 . . . . . i, ii, 2, 15

U.S. Constitution amend. XI 8

Ky. Const. § 242 . . . . . i, ii, 3, 15

Part 1, Hardin County Solid Waste
Management Plan 3, 5

Part 2, Hardin County Solid Waste
Management Plan 3, 6

Petitioner respectfully petitions this Court for a writ of certiorari to review the judgment rendered in this case by the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Sixth Circuit was issued August 15, 2002. It is cited at 2002 U.S. App. LEXIS 16714, 2002-2 Trade Cas. (CCH) P 73,773 and reproduced at Appendix A at 1a. The unreported memorandum opinion and final judgment of the United States District Court for the Western District of Kentucky, Judge Charles R. Simpson, III, granting Respondents' motion for summary judgment on all of Petitioner's claims, were issued on August 28, 2000 and are reproduced at Appendix B at 21a. and Appendix C at 29a. The earlier, unreported memorandum opinion and order of the District Court issued on November 27, 1996, granting in part and denying in part the Respondents' motion for partial summary judgment, are reproduced at Appendix D at 31a and Appendix E at 54a.

In addition, because this case involves Kentucky state court litigation concerning the Respondents' actions and a local "conditional use" (zoning) ordinance, the following state court decisions are reproduced in the Appendix in reverse chronological order: Hardin County Circuit Court Opinion and Summary Judgment in *Blue Ribbon Properties, Inc., d/b/a Long Hollow Landfill,* v. *Hardin County Fiscal Court, Hardin County, Kentucky and Hardin County Planning and Development Commission*, No. 91-CI-519 (April 26, 1993), unreported, App. I at 74a; Kentucky Court of Appeals Opinion in *Hardin County, Hardin Fiscal Court and Hardin County Planning and Development Commission v. Blue Ribbon Properties, Inc., d/b/a Long Hollow Landfill,* Nos.

93-CA-1099-MR and 93-CA-1291-MR, unreported, (January 6, 1995)(adopting its Opinion in *Hardin County, et al. v. Joan Jost, et al.*, rendered January 6, 1995), App. H at 70a; *Hardin County, et al., v. Joan Jost, et al.*, reported at 897 S.W. 2d 592 (Ky. App. 1995), App. G at 58a; and Kentucky Supreme Court Order Denying Discretionary Review in *Jost* and *Blue Ribbon,* Nos. 95-SC-79-D and 95-SC-80-D, unreported, (May 31, 1995), App. F at 57a.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Sixth Circuit entered its Judgment on August 15, 2002. No petition for rehearing was filed.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional and regulatory provisions, the latter of which are reproduced in the Appendix at App. J at 98a and App. K at 99a:

I. U.S. Const. amend. V, "due process" and "takings" clauses provide, "No person shall ...; *** be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

II. U.S. Const. amend. XIV, Sec. 1 provides, "No State shall make or enforce any law which shall abridge the privileges and immunities of

citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

III. Ky. Const. Sec. 242 provides in material part, "Municipal and other corporations, and individuals invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured or destroyed by them; which compensation shall be paid before such taking, or paid or secured, at the election of such corporation or individual before such injury or destruction." ***

IV. Part 1, Hardin County Solid Waste Management Plan, October 1, 1991, page 1081.

V. Part 2, Hardin County Solid Waste Management Plan, January 1, 1993, revised March 23, 1993, page 18.

STATEMENT OF THE CASE AND FACTS

In 1987 Burt Wilson learned from Shelby Jett, an official in the Commonwealth of Kentucky Natural Resources and Environmental Protection Cabinet's Division of Waste Management, that by June 30, 1992 Hardin County, Kentucky would be required to close its existing landfill. Wilson was then the successful developer, owner and operator of a solid waste landfill in Russellville, Kentucky. In 1987 or 1988 Wilson spoke to then Hardin County Judge Executive,

R.R. "Babe" Thomas, about the County's plans. Wilson told County Judge Thomas of his interest in proposing a solution to the County's problem. Thomas asked Wilson for his address, saying that Wilson would receive specifications for Hardin County's "solid waste situation." Wilson received the promised specifications and began to develop a proposal.

Knowing that much of Kentucky's land, including most of Hardin County, is unsuitable for landfills because the karst geology of its bedrock has a propensity to form sinkholes, Wilson hired an eminent hydro-geologist to find a sound landfill site. They found suitable bedrock in the Muldraugh escarpment, a small geological formation adjacent to a federal interstate highway in Hardin County. Armed with this knowledge and geological maps, Wilson formed Blue Ribbon Properties, Inc. and assembled a large parcel of land for the site to be called "Long Hollow."

In 1989 Blue Ribbon Properties, Inc. formally proposed the Long Hollow landfill development to replace the County's old facility, and applied to the Hardin County Planning and Development Commission for a conditional use permit. Blue Ribbon also began work on its landfill application to the Commonwealth of Kentucky Natural Resources and Environmental Protection Cabinet. From 1989 to 1991 Blue Ribbon's conditional use (zoning) application was subjected to extensive review in Hardin County. In addition to meetings with County officials, Blue Ribbon's application resulted in five public hearings before the Commission. On February 5, 1991 the Commission denied Blue Ribbon's application based on the County's zoning ordinance. Blue Ribbon appealed the Commission's denial to the Hardin County Fiscal Court, which upheld the Commission and denied the appeal. On April 10, 1991 Blue Ribbon sued the Fiscal Court and Planning Commission for

declaratory relief in the Hardin Circuit Court, seeking a declaration that the ordinance and the County's actions were unlawful.

Meanwhile, in 1992-1993, the County adopted a "Solid Waste Management Plan" in two "parts," dated October 1, 1992 and January 1, 1993 respectively in response to Kentucky environmental legislation enacted in 1991. The state legislation required county governments to evaluate existing disposal methods, identify illegal dumps, and project future local and regional disposal needs. Both parts of the County's Plan gratuitously contained a provision acknowledging Blue Ribbon's pending application, but declaring that its proposed Long Hollow landfill would have no role in the County's plans. Part 1, adopted on October 1, 1992 after Blue Ribbon had filed suit for declaratory relief in the Hardin Circuit Court, said,

> The fact remains that an application by Blue Ribbon Properties, Inc. to construct a municipal solid waste landfill in the Colesburg area of Hardin County has been denied by the Hardin County Planning Commission and the Hardin County Fiscal Court as an inappropriate land use at that particular site. Therefore neither the current Hardin County Landfill nor the proposed landfill by Blue Ribbon Properties, Inc. is a viable or feasible alternative or solution for the sol[id] waste needs for the next 5, 10, and 20 year periods.

(App. J)

On April 26, 1993 the Hardin Circuit Court granted summary judgment for Blue Ribbon in *Blue Ribbon Properties, Inc. v. Hardin County*, Civil Action No.91-CI-519. (App. I) The decision declared the County's zoning ordinance invalid and vacated the County's denial of Blue Ribbon's application for a conditional use (zoning) permit. Months earlier, the Hardin Circuit Court had declared the County's ordinance invalid in a companion action styled, *Joan Jost, et al. v. Hardin County, et al.*, Hardin Circuit Court Civil Action No. 91-CI-1554, which involved an animal shelter's application.

The Hardin Circuit Court held that the County's ordinance was invalid on multiple grounds. Some of the stated grounds were that the ordinance did not give reasonable notice to a prospective investor of the use to which its property might be put; it provided no objective standards for the granting or denial of conditional use permits; and its "growth assessment guidelines" were incapable of being applied to Blue Ribbon's proposed use. In effect, the Hardin Circuit Court wrote, the ordinance allowed neighboring landowners to determine the "compatibility" of the applicant's proposed use. The court also said, "A zoning authority's insistence on considering the owner's specific use of a parcel of land is not zoning but direct governmental control of each parcel of land which is inconsistent with constitutionally-guaranteed property rights." (App. I)

Part 2 of the County's Solid Waste Management Plan, which it adopted just before the Hardin Circuit Court rendered its decisions in *Jost* and *Blue Ribbon,* affirmed the County's previous refusal to consider Blue Ribbon's proposal:

> Pending Application of Longhollow Landfill -
> - the County recognizes that an application has

> been submitted by Blue Ribbon Properties, Inc. under the name of Longhollow Landfill. [T]his facility has been proposed to be located within Hardin County. *Longhollow Landfill is not to be considered as an option for waste disposal within the County.* The Hardin County Planning and Development Commission has denied an applica[ti]on for this land use due to the fact that *it does not meet the criteria established by the planning unit.* In addition, the Hardin County Fiscal Court has *denied Longhollow Landfill as an acceptable land use under a review of the planning process.*

(App. K)(Italics supplied.)

Hardin County appealed both rulings to the Kentucky Court of Appeals, which affirmed both in January, 1995. *See, Hardin County, et al. v. Jost, et al.,* 897 S.W.2d 592 (Ky.App.1995) (App. H). Significantly for Blue Ribbon's case, the Court of Appeals Opinion "adopt[ed]" as "[its] own" much of the Hardin court's opinion, also adopted in *Jost*. *See,* 897 S.W. 2d at 593 (App. H). The Court of Appeals decision in the affirmed the Hardin Circuit Court's invalidation of the County zoning ordinance and the order vacating the County's denial of Blue Ribbon's application.

On remand from the Kentucky Court of Appeals, Blue Ribbon requested "local determination" reconsideration of its permit application in light of the courts' rulings and state law. On July 24, 1995 the Fiscal Court again denied Blue Ribbon's application, stating as its reason the County's recently-adopted Plan's explicit rejection of Blue Ribbon's Long Hollow proposal as an incompatible land use. This second denial of

Blue Ribbon's application was based squarely on the County's earlier "incompatibility" determination and denial of Blue Ribbon's *original* application. That determination and denial had been vacated by the Hardin Circuit Court's judgment and affirmed by the Court of Appeals after holding the ordinance itself invalid. The Commonwealth of Kentucky Natural Resources and Environmental Protection Cabinet declined to override the County's action.

State judicial review of the County's conduct having proved ineffectual, on December 27, 1995 Blue Ribbon sued the Hardin County Fiscal Court, the Hardin County Planning and Development Commission and the Kentucky Natural Resources and Environmental Protection Cabinet in the District Court. Blue Ribbon alleged that the County's action amounted to a regulatory taking of its property without just compensation in violation of the Fifth Amendment of the U.S. Constitution; it denied Blue Ribbon its constitutional rights of due process and equal protection under 42 U.S.C. § 1983; with the Cabinet's tacit approval it had combined to restrain or monopolize trade and a monopoly in fact in the solid waste disposal industry and unlawful discrimination against interstate commerce in violation of the Sherman Antitrust Act, 15 U.S.C. §§ 1-2 and the Commerce Clause of the U. S. Constitution, art. I, § 8, cl. 3; and it was actionable as tortious interference under Kentucky law.

The District Court initially dismissed the Cabinet on grounds of its Eleventh Amendment immunity, and on November 27, 1996 dismissed Blue Ribbon's claims against the County except the Sherman Antitrust Act claims. (Apps. D and E) Blue Ribbon amended its complaint to assert a state law inverse or reverse condemnation claim. Blue Ribbon contended, *inter alia,* that the County had taken its property either under Kentucky case law incorporating the six takings

factors identified in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), or this Court's decision in *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992). The County argued in response that a complete taking of the property could not be shown, asserting that Blue Ribbon retained other uses of its property.

On August 28, 2000 the District Court granted summary judgment for the County and dismissed Blue Ribbon's remaining claims. (Apps. B and C) The District Court held that the reverse or inverse condemnation claim failed because Blue Ribbon had not been denied all beneficial enjoyment of its property, but only "the most lucrative use" of the property. The District Court concluded that absent a complete denial of all use of the property, a taking could not occur. Blue Ribbon timely appealed the District Court's judgment to the United States Court of Appeals for the Sixth Circuit.

On appeal, Blue Ribbon sought reversal on three of its claims in the District Court: inverse condemnation under State law or regulatory taking under federal law, the dormant Commerce Clause claim, and the County's de facto monopolization of the relevant market under Section 1 of the Sherman Antitrust Act. On August 15, 2002 the Court of Appeals affirmed the District Court's judgment. (App. A) Respecting Blue Ribbon's takings claims under state and federal law, the Sixth Circuit agreed with Blue Ribbon that the County's actions had interfered with its investment-backed expectations, but found that it had not shown that there was "no productive use to which Blue Ribbon can put its property," or that "all economically productive use" of the property had been lost due to the County's action.

The Sixth Circuit also found that Blue Ribbon purchased its property with knowledge that County and State permits would be necessary to construct or operate a landfill; and the Fiscal Court had acted "pursuant to a plan it enacted pursuant to Kentucky law." These facts, said the Sixth Circuit, did not support a finding that the Fiscal Court or its plan were "arbitrary." Finally, the Sixth Circuit observed that there "was not a physical invasion" of Blue Ribbon's property and that "judicial review was available."

The Sixth Circuit concluded:

> We are not deaf to Blue Ribbon's implicit cry of unfairness here. Blue Ribbon is not only being denied [the] opportunity to make the best use of its property -- a use for which the property is geologically suited and for which the property was purchased -- it is being denied that opportunity by the very body that itself will operate the kind of facility Blue Ribbon intended to operate. Fairness, however, is not the issue before us. *** Fair or not, the County's actions were not illegal. ***

REASONS FOR GRANTING THE WRIT

This case of constitutional significance presents important questions that should be addressed now as part of this Court's takings jurisprudence. The first question asks whether a local government can deny a private investor's zoning application after its zoning ordinance is judicially declared invalid without committing a taking of the investor's property for which just compensation constitutionally must be paid. The second question asks whether a private investor

that, with a local government's knowledge, expends substantial capital to acquire and evaluate property to respond to government's invitation for private investor proposals, and after doing so the government denies its application to develop the property on the basis of a zoning ordinance that has been adjudicated invalid, has suffered a compensable taking of its property.

In this case the County repeatedly relied on a judicially-invalidated zoning law to deny Blue Ribbon's application to develop its property for the Long Hollow project. Ultimately, the County used the invalidated Commission findings to justify excluding the Long Hollow proposal from its state-mandated area solid waste management plan. The County thus destroyed the reasonable investment-backed expectations that it had fostered when Blue Ribbon was invited to propose a solution to the County's public health and welfare problem, the scheduled closing of the County's existing landfill. But for the County's invitation, Blue Ribbon would not have acted as it did. It would not have made the enormous investment of capital necessary to acquire the particular investment property that it did. Nor would it have expended even more capital to test and evaluate the property's fitness for its particular and specialized purpose as a modern landfill site.

The County's conduct toward Blue Ribbon was not a legitimate exercise of government authority under the police power. The Kentucky courts' invalidation of the County's zoning ordinance and vacating the County's denial of Blue Ribbon's zoning application deprived the County of the right and the authority to act based on the ordinance. The County's conduct thereafter cannot reasonably be regarded as government action advancing a legitimate public interest. *See, Agins v. City of Tiburon,* 447 U.S. 255, 260 (1980). Nor can

it be said that illegitimate government conduct substantially furthers important public policies. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 127-8 (1978). Rather, such conduct "go[es] too far" under *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), and should be considered a taking of property under the *Penn Central* analysis.

The Sixth Circuit agreed that the County had interfered with Blue Ribbon's investment-backed expectations. But it also noted that Blue Ribbon was aware from the beginning that development of its landfill required the County's approval. However, the Sixth Circuit's analysis simply ignores the fact of the County's encouragement of private investors, including Blue Ribbon, by inviting proposals from them, to have investment-backed expectations. Clearly, the County was aware of Blue Ribbon's activities in response to its invitation. It was therefore reasonable for Blue Ribbon to have investment-backed expectations under those circumstances. The County's arbitrary conduct not only interfered with those expectations, but it destroyed them entirely. The Sixth Circuit wrote in its conclusion, "Fair or not, the County's actions were not illegal." Given the utter lack of legal authority for the County's denial, the Sixth Circuit's conclusion begs for this Court's review.

I. This Court's Precedents Do Not Resolve This Case.

This Court's regulatory takings cases neither address nor answer the questions presented by Blue Ribbon's petition. Petitioner is aware of no decision having analogous facts. In none of this Court's regulatory takings cases does it appear that a petitioner acquired its property as Blue Ribbon did in this case. Blue Ribbon acquired its property solely as an element of its business plan in response to the County's

invitation of private proposals on a matter of public interest and concern, the scheduled closure of its local landfill. Nor in this Court's decisions does it appear that the government regulation involved in the taking previously had been adjudicated invalid or unlawful, contrasting with the zoning ordinance in this case. Finally, in none does it appear that a petitioner had successfully challenged the unlawful regulation, and that the governmental body had ignored or disregarded the judgment by continuing to assert the invalidated law.

In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), this Court said that a taking of property will be found when the government regulation "goes too far." In *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104 (1978), this Court said that where there is no physical intrusion resulting in a *per se* taking, the court's inquiry should focus on consideration of several factors in light of the particular facts of the case, including the economic impact of the law on the claimant, the character of the government action, the extent to which the regulation interferes with distinct investment-backed expectations, whether the action was arbitrary or unreasonable, the uses permitted by the regulation, and judicial review of the agency decision. The principles of these two decisions are the foundation of Blue Ribbon's takings claim.

II. Penn Central, Lucas and Tahoe-Sierra Support Petitioner's Takings Claim.

After rendering its decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), where the Court held that a South Carolina law had deprived the owner of development property of "all economically beneficial uses of his land," the Court declared in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, ___ U.S.

___, 122 S. Ct. 1466, 152 L. Ed.2d 517 (2002), that *Lucas* must be limited to "the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted." Henceforth, the Court said in *Tahoe-Sierra,* regulations that merely restrict the uses of property can be takings only if they "go too far," and that courts should conduct a case-by-case analysis of the several factors identified in *Penn Central Transportation Co. v. New York City*. 122 S. Ct. at 1480, 152 L. Ed.2d at 542.

This case was briefed and argued in the Sixth Circuit Court of Appeals before the Court handed down its decision in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*. While *Tahoe-Sierra* clearly limits the scope of the decision in *Lucas*, it does not say that only in cases like *Lucas* will a categorical taking be recognized. Blue Ribbon reads *Tahoe-Sierra* as affirming the vitality of *Penn Central*'s multiple takings-factor analysis as well as the core regulatory takings principle stated in *Pennsylvania Coal Co. v. Mahon*: regulation of property that "goes too far" is a taking of that property. In the District Court and in the Sixth Circuit Court of Appeals, Blue Ribbon consistently argued that under either the rationale of *Lucas* or *Commonwealth of Kentucky Natural Resources and Environmental Protection Cabinet v. Stearns Coal and Lumber Co.*, 678 S.W.2d 378 (Ky. 1984), Kentucky's leading regulatory takings case, there was a taking in this case. But because this case presents significantly different facts from which a categorical taking may be found, *Lucas* must be considered.

The County's conduct implicates at least four of the six *Stearns Coal/Penn Central* factors. First is the arbitrariness of the County's denial of Blue Ribbon's application after the state courts declared the zoning ordinance invalid and vacated the original denial. Second is the effect of

the County's unlawful denial on Blue Ribbon, and its interference with reasonable investment-backed expectations. Third is the substantial economic impact of the County's denial on Blue Ribbon, which during its years of litigation with the County has realized only a de minimis economic benefit from its property. Fourth is that Blue Ribbon's successful state court judicial challenge to the County's actions was no impediment to the County, which ignored the courts and continued its wrongful conduct unabated.

Stearns Coal embodies this Court's takings jurisprudence. In *Stearns Coal* the Kentucky Supreme Court adopted the *Penn Central* takings-factor analysis and applied it to the facts of that case. So this is not a case where Blue Ribbon merely seeks relief under state law, or where state law supplies the rule of decision. It is instead a takings case brought under the Fifth and Fourteenth Amendments, and the courts thus far have held that Blue Ribbon lacks a remedy under either federal or state takings law.

Although Blue Ribbon consistently argued in the Sixth Circuit and the District Court that the County's actions amounted to a taking of its property under the Fifth and Fourteenth Amendments, United States Constitution or *Stearns Coal* and Kentucky's Constitution Section 242, both the Sixth Circuit and the District Court erred in finding that the County had not deprived Blue Ribbon of all use, value, or beneficial enjoyment of its property, but only its "most lucrative" use. These holdings ignore this Court's precedents, which teach that deprivation of use, value, or beneficial enjoyment is determined on a case-by-case basis, and measured by the regulation's effect upon the owner's use and enjoyment of the property. The Sixth Circuit's decision focused on a single takings factor, whether the County's action had deprived Blue Ribbon of all possible use of the

property. The Sixth Circuit instead should have considered the effect of the County's actions on Blue Ribbon's expectations and ability to use its property as an investor that acquired the property for a specific purpose. The Sixth Circuit thus misconceived *Commonwealth Natural Resources and Environmental Protection Cabinet v. Stearns Coal and Lumber Co.*, 678 S.W.2d 378 (Ky. 1984), and by necessary implication *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104 (1978).

III. The County's Arbitrary Conduct Deprived The Petitioner Of Its Investment.

Blue Ribbon's investment in its Hardin County site is substantial. Between 1988 and 1995 when it filed its present suit against the County, Blue Ribbon located, tested, and acquired almost six hundred (600) acres of land, retained and paid engineers and scientists to test and analyze the property, engaged legal counsel to assist it in the five public hearings and the permitting procedures, and incurred the costs of borrowed funds for the project. In late 2000, Burt Wilson estimated Blue Ribbon's permitting, land and engineering costs alone to be about $850,000.00. In contrast, Wilson testified that Blue Ribbon's annual rental income was approximately $14,500.00.

The Sixth Circuit agreed with Blue Ribbon that the County's actions destroyed its "distinct investment-backed expectations." Even so, the Sixth Circuit also found that the property retained economically-productive use, even suggesting that Blue Ribbon could sell its timber. But Blue Ribbon did not acquire the property and expend its resources for geo-technical and hydrological testing in order to sell timber. It acquired the property for a particular and specialized purpose, to construct and operate a modern

landfill. Blue Ribbon's consultants agree that the property is well-suited for the purpose, and that its highest and best use is as a landfill. Based on the consultants' evaluations, the County's wrongful conduct has cost Blue Ribbon millions of dollars. Its property has little agricultural value. There is no known prospect of economically-significant use or development for the property. Nothing in the record supports the inference that the property has other economically-beneficial uses. Therefore, Blue Ribbon has sustained a taking of the property's only established economically-beneficial use.

Kentucky's 1991 enactment of solid waste legislation required the County to develop a solid waste management plan but did not prescribe the details of the plan. With the legislation as a pretext, the County literally wrote Blue Ribbon out of its Solid Waste Management Plan. This action was not required by the new law. In Parts 1 and 2 of the Plan, the County declared that the Long Hollow landfill project would not be a part of its future planning for solid waste reduction or disposal. (Apps. J and K) The County's exclusion of Blue Ribbon from the Plan underscores the finality of the County's action and the certainty of Blue Ribbon's deprivation.

The Sixth Circuit Court of Appeals should have found that the County's actions destroyed Blue Ribbon's reasonable investment-backed expectations and effected a taking of its property. The County's conduct, unquestionably based on its invalidated zoning ordinance, was literally lawless. Therefore it was arbitrary and unreasonable. It has permanently deprived Blue Ribbon of the opportunity to develop its investment property. *Penn Central, Lucas,* and this Court's takings decisions should be extended to afford a remedy for arbitrary government regulations that deprive investors like Blue Ribbon of their property. The County's

conduct was unjustified, being neither discretionary nor within its police power. It should be viewed as a regulatory abuse of power that "goes too far" and was a taking of property for public use.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Stanley W. Whetzel, Jr.
Counsel of Record
Attorney for Petitioner
3850 National City Tower
101 South Fifth Street
Louisville, Kentucky
Telephone: 502-582-1891
FAX: 502-582-1895

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 00-6345

[Filed August 15, 2002]

BLUE RIBBON PROPERTIES, INC., d.b.a. Long Hollow Landfill, *Plaintiff-Appellant*,	)
v.	)
HARDIN COUNTY FISCAL COURT; HARDIN COUNTY, KENTUCKY; HARDIN COUNTY PLANNING AND DEVELOPMENT COMMISSION, *Defendants-Appellees*.	)

JUDGES:
Before SUHRHEINRICH, SILER, and BATCHELDER, Circuit Judges.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY

ALICE M. BATCHELDER, Circuit Judge. Blue Ribbon Properties, Inc., appeals the district court's orders

granting summary judgment to the Hardin County Fiscal Court and the Hardin County Planning and Development Commission (collectively "the County" hereinafter) on Blue Ribbon's claims of inverse condemnation under Kentucky law, violation of the Interstate Commerce Clause, and violation of the Sherman Antitrust Act. Because we conclude that Blue Ribbon has not presented sufficient evidence to create a genuine issue of fact material to any of these claims and the defendants are entitled to judgment as a matter of law, we affirm the judgment of the district court.

I.

Burt Wilson, the president of Blue Ribbon, began to explore the possibility of opening a landfill in Hardin County, Kentucky, when he learned in 1987 that Hardin County's sole landfill was scheduled to be closed in June, 1992. Wilson hired a hydrologist to ascertain what, if any, land in Hardin County was suitable for a landfill. According to the hydrologist, most of Hardin County was not suitable because of the porous nature of the bedrock underlying the County. One small portion of the County, however, a shale outcropping--called the Muldraugh escarpment--through which water would not flow, was determined to be well suited for the purpose. In 1989, Wilson purchased the 590 acres of land upon the escarpment that is the subject of this suit.

Blue Ribbon applied for a conditional use permit[1] from the Hardin County Planning and Development Commission (Commission) on October 24, 1989. Also in October 1989, Blue Ribbon submitted the required state landfill application to the Natural Resources and Environmental Protection Cabinet (Cabinet), the state agency entrusted with authority over landfills.

The Commission held five public hearings before denying Blue Ribbon's request for a conditional use permit on February 5, 1991. The Commission listed as reasons for its denial: (1) the danger that archaeological sites might be destroyed; (2) the additional traffic on county roads that were prone to flooding and were not made to withstand a high volume of heavy truck traffic; (3) high noise levels; (4) unsightly view; and (5) odor nuisance.

Blue Ribbon appealed the denial to the Hardin County Fiscal Court (Fiscal Court or Court), which is the governing body of Hardin County. The Fiscal Court, on March 11, 1991, voted to deny Blue Ribbon's application for a conditional use.

---

[1] The County's zoning ordinance in effect at the time designated the entire county as one zone and designated three permissible uses for the zone: agricultural, single family residential, and conditional. Use of land for agricultural and single family residential purposes was as of right. A conditional use, defined as "a use of land or activity permitted only after fulfillment of all local regulations," required a permit.

On April 10, 1991, Blue Ribbon sued in Hardin County Circuit Court challenging Hardin County's zoning ordinance and the County's denial of Blue Ribbon's application. The court ruled in April 1993 that the zoning ordinance was invalid under state law and that the County's denial of Blue Ribbon's application was unlawful. The Kentucky Court of Appeals affirmed and the Supreme Court of Kentucky denied review.

In 1991, the Commonwealth enacted legislation that required each county to create an area solid waste management plan. Ky. Rev. Stat. Ann. § 224.43 *et seq.* In the fall of 1991, while Blue Ribbon's suit was wending its way through the court system, the County purchased 1,373 acres to use as a landfill, and applied to the Cabinet for a landfill permit. Hardin County subsequently adopted its plan, which expressly excluded Blue Ribbon's proposed landfill as a viable option for the disposal of solid waste within the County.

After its victory in the state courts, Blue Ribbon again attempted to obtain a permit to operate a landfill. The Fiscal Court held a public hearing in July 1995 to determine whether Blue Ribbon's proposed landfill was consistent with the requirements of the Hardin County solid waste management plan. The Commission presented its reasons for opposing the landfill and the Fiscal Court found, for essentially the same reasons that it had denied the first application, as well as the specific exclusion of the Blue Ribbon landfill from the County's plan and the landfill that the Fiscal Court was in the process of constructing, that it was not. On October 2, 1995, the Cabinet sent Blue Ribbon a letter explaining that, although it had the authority to overrule the Fiscal Court's denial of

Blue Ribbon's application, it was unlikely to do so given the requirements of the law, the capacity needs of Hardin County and the other elements of the Hardin County plan.

Blue Ribbon then brought this action against the Fiscal Court, the Commission, and the Cabinet, asserting five claims: (1) an unconstitutional regulatory taking under the Fifth and Fourteenth Amendments; (2) a 42 U.S.C. § 1983 claim alleging a deprivation of due process and equal protection in violation of the Fourteenth Amendment; (3) a violation of the Interstate Commerce Clause; (4) violations of the Sherman Antitrust Act, 15 U.S.C. § § 1 and 2; and (5) a state law claim for tortious interference with a prospective advantage. Blue Ribbon sought injunctive relief, compensation of $25 million, and punitive damages of $2 million.

The district court dismissed Blue Ribbon's claims against the Cabinet on the basis of Eleventh Amendment immunity. The court then granted partial summary judgment against Blue Ribbon on all of its claims except for the antitrust claims, ruling that: Blue Ribbon's federal takings claim was not ripe for adjudication because Blue Ribbon had failed to exhaust its state remedies through an inverse condemnation action; the § 1983 claim must be dismissed on collateral estoppel grounds because the district court was bound by the Hardin County Circuit Court's earlier ruling that the Fiscal Court and Commission were not "persons" within the meaning of § 1983; the defendants were entitled to judgment on the Commerce Clause claim because Blue Ribbon had failed to allege any facts that would show that the County "discriminated...against out-of-state waste or landfill operators in the design and implementation of the Hardin

County Solid Waste Plan;" and under Kentucky law, the County was immune from suit on the tortious interference claim. The district court refused to grant summary judgment on the antitrust claims because the County's motion was premised solely on *Parker v. Brown,* 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943), and the immunity announced in that case was not available to the Fiscal Court and Commission because they had made no showing that they had acted in accordance with a "clearly articulated and affirmatively expressed state policy" to displace competition and impose regulation or monopoly.

Blue Ribbon requested and was granted leave to amend its complaint. In the amended complaint Blue Ribbon added an inverse condemnation claim alleging that the Fiscal Court and Commission condemned Blue Ribbon's property in violation of the Federal and Kentucky Constitutions.

Following discovery, both parties moved for summary judgment and on August 28, 2000, the district court granted the County's motion. The district court first ruled that Blue Ribbon had failed to offer sufficient evidence to create a genuine issue for trial on Blue Ribbon's claim that the County had "conspired" with the Cabinet, within the meaning of Section 1 of the Sherman Act, to restrain trade or commerce. The court noted that the sole evidence introduced by Blue Ribbon was the October 2, 1995, letter from the Cabinet explaining that, although it had the authority to overrule the Fiscal Court's denial of Blue Ribbon's application, it was unlikely to do so. The court further held that Blue Ribbon had failed to satisfy its burden with regard to Section 2 of the Sherman Act because it failed to show that the County had monopolized the "relevant market" for solid waste in Hardin

County. The relevant market, the court held, was much broader than the County itself, and the Fiscal Court and Commission, with no authority outside of the County, could not monopolize and control the market. The district court rejected the new inverse condemnation claim, holding that since Blue Ribbon was not denied all beneficial use and enjoyment of its property, there was no taking.

In this timely appeal, Blue Ribbon urges us to hold that the district court erred in its determination that the County did not take Blue Ribbon's property without just compensation and consequently erred in granting summary judgment on the state law inverse condemnation claim; that the district court erred in finding that the actions of the Fiscal Court and the Commission in denying Blue Ribbon's application for a permit to construct and operate a landfill did not impermissibly burden interstate commerce; and that the district court erred in finding that the County did not seek to monopolize the relevant solid waste market in violation of Section 2 of the Sherman Antitrust Act.

II.

We review the district court's grant of summary judgment de novo. *Daughenbaugh v. City of Tiffin*, 150 F.3d 594, 597 (6th Cir. 1998). We view the evidence, all facts, and any inferences that may be drawn from the facts in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as

a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

III.

Blue Ribbon argues that the Fiscal Court's and the Commission's denial of Blue Ribbon's application for the necessary permit to operate a landfill on its property was a taking under Kentucky's inverse condemnation laws because the denial deprived Blue Ribbon of "meaningful" economic use of its land. We cannot agree.

Both parties rely heavily on *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992), and *Commonwealth v. Stearns Coal and Lumber Co.*, 678 S.W.2d 378 (Ky. 1984), to support their respective positions on Blue Ribbon's inverse condemnation claim. In *Lucas* the Supreme Court ruled that a South Carolina statute, which prevented the plaintiff from altering his beach front property in any way, had deprived the owner of "all economically beneficial or productive use of [his] land" and therefore constituted a regulatory taking requiring compensation under the Fifth Amendment. *Lucas* 505 U.S. at 1015. The Court, through Justice Scalia, built on *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 67 L. Ed. 322, 43 S. Ct. 158 (1922), which had held that a compensable taking occurred, even absent a direct physical appropriation, when the government regulated property to such an extent that the regulation was the "functional equivalent of a 'practical ouster of [the owner's] possession.'" *Lucas*, 505 U.S. at 1014. Reluctant to expand the notion of regulatory takings too far for fear that government's ability to legitimately regulate aspects of the nation's economic life would be compromised,

the Court repeatedly emphasized the "extraordinary" nature of a regulation that would qualify as a taking because it would allow a property owner "*no* productive or economically beneficial use of land." *Id.* at 1017. *See also id.* at 1019 ("When the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.").

In *Stearns Coal,* the Kentucky Supreme Court confronted a Kentucky statute, the Wild Rivers Act, that required designated lands to remain in their pristine state. *Stearns Coal,* 678 S.W.2d at 381. Although decided approximately eight years prior to *Lucas, Stearns Coal* set the same rigorous standard for regulatory takings when it analyzed the inverse condemnation action brought to force compensation from the Commonwealth. *See id.* at 382 (defining a regulatory taking as government action that "completely frustrates the landowner's rights and deprives him of the use of his property"). The *Stearns* Court also relied heavily on the same cases and federal law the United States Supreme Court later relied upon in *Lucas.* The Kentucky Supreme Court listed six factors used to guide courts in determining whether a taking has occurred:

> (1) the economic impact of the law on the claimant, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, (3) the "character" of the governmental action, that is whether the action is a physical invasion versus a public program adjusting the benefits and burdens of economic life to promote the common good, (4) what

> uses the regulation permits, (5) that the inclusion of the protected property was not arbitrary or unreasonable, and (6) that judicial review of the agency decision was available.

Id. at 381. The court ruled that a regulation of property is not invalid simply because "it deprives a property owner of the most beneficial use of the property." *Id.* at 382. Although the Wild Rivers Act, if fully executed, could have effected a taking of plaintiff's property, the court said, the fact was the plaintiff had succeeded in having the Act's enforcement enjoined and the plaintiff had made and continued to make substantial beneficial use of its property. Therefore, no taking had occurred. *Id.* at 382-83.

We conclude that Blue Ribbon has not satisfied the *Stearns Coal* requirements to demonstrate a taking. It was Blue Ribbon's burden to present evidence sufficient to create a genuine issue for the trier of fact that there is no productive use to which Blue Ribbon can put its property or that all economically productive use of the property has been lost due to government action. Blue Ribbon has not sustained this burden. Although there does not appear to be any genuine issue with regard to Blue Ribbon's assertion that those productive uses are significantly less remunerative than the proposed landfill likely would have been, the record nonetheless demonstrates that Blue Ribbon has received an annual income from the property through agricultural and billboard leases, there is timber on the property that Blue Ribbon could presumably sell, and some of the land is suitable for farming. There is no doubt that the County's actions interfered with Blue Ribbon's investment-backed expectations, but Blue Ribbon purchased the property with the

knowledge that it could not construct or operate a landfill on it without obtaining County and state permits. In denying the permit, the Fiscal Court acted pursuant to a plan it enacted pursuant to Kentucky law, and the record does not support a finding that the plan or the Fiscal Court's action were arbitrary. The County's action was not a physical invasion. Finally, judicial review was available.

We conclude that the district court did not err in granting summary judgment to the County on the state law inverse condemnation claim.

IV.

The Interstate Commerce Clause vests Congress with the exclusive authority to regulate commerce among the several states. *Gibbons v. Ogden*, 22 U.S. (9Wheat.) 1, 6 L. Ed. 23 (1824). The Commerce Clause has a negative or dormant component that the Court has ruled generally precludes state regulation of or discrimination against interstate commerce. *Welton v. Missouri*, 91 U.S. (1 Otto.) 275, 23 L. Ed. 347 (1875). The Supreme Court has repeatedly held, however, that in the absence of congressional regulation, states have the residual authority to regulate their own affairs even if such regulation results in an incidental burden on interstate commerce. *Hughes v. Oklahoma*, 441 U.S. 322, 336, 60 L. Ed. 2d 250, 99 S. Ct. 1727 (1979).

The Supreme Court has created a two-step analysis of dormant commerce clause claims. The first step requires courts to determine whether the challenged action discriminates against interstate commerce. This discrimination may take one of three forms. The challenged statute or action

might: (1) facially discriminate against out-of-state goods or services, (2) have a primary purpose of discrimination, or (3) have a discriminatory effect. *See SDDS, Inc. v. South Dakota*, 47 F.3d 263, 267 (8th Cir. 1995) (giving an overview of dormant commerce clause jurisprudence). The second step involves determining the correct level of scrutiny applicable to the challenged governmental action. *Id.* at 268. If the statute or action by the government discriminates in any of the three ways listed above, reviewing courts will apply the "strictest scrutiny." *Or. Waste Sys., Inc. v. Dept. of Env. Quality of the State of Or.*, 511 U.S. 93, 101, 128 L. Ed. 2d 13, 114 S. Ct. 1345 (1994). The burden, in a case where a court has found that the challenged government action discriminates, is on the government to show that the government action "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Id.* (quoting *New Energy Co. of Ind. v. Limbach,* 486 U.S. 269, 278, 100 L. Ed. 2d 302, 108 S. Ct. 1803 (1988)). Here, Blue Ribbon bears the initial burden of showing that the Fiscal Court's action had a discriminatory purpose or effect on interstate commerce. *Hughes*, 441 U.S. at 336.

Alternatively, if we determine that the Fiscal Court's denial of Blue Ribbon's application did not discriminate against interstate commerce, we must apply the balancing test announced in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 25 L. Ed. 2d 174, 90 S. Ct. 844 (1970). In *Pike,* the Supreme Court ruled that nondiscriminatory regulations that only incidentally burden commerce are valid "unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.* at 142. Therefore, a court is required to balance the purported benefits of the regulation

against its impact on commerce and to determine whether the government could advance the local interest equally well through means with a lesser impact on interstate commerce. *Id.*

In essence, Blue Ribbon claims that the Fiscal Court's denial of its application for a solid waste landfill was motivated by a purpose to discriminate against out-of-state waste. As evidence of this intent, Blue Ribbon points to the Hardin County Plan's designating only seven contiguous Kentucky counties as the source of "out-of-area" waste to be received by any Hardin County landfill. Because the County's plan does not also designate non-Kentucky areas in the "out-of-area" category, Blue Ribbon argues, the Plan discriminates against interstate commerce.

Blue Ribbon also relies on statements made on three occasions by Judge Dalton, the Fiscal Court's chief officer and one of the nine persons who voted on Blue Ribbon's application, that he did not want to approve Blue Ribbon's application for fear that Hardin County would become a dumping ground for out-of-state waste. Lastly, Blue Ribbon asserts that the County's denial of Blue Ribbon's application also provides evidence of a discriminatory purpose.

The Hardin County Plan's "out-of-area" designation does not evidence either facial discrimination or a discriminatory purpose. Rather, it is a recognition of the fact that solid waste is profitably transported no more than approximately seventy-five miles (a fact not in dispute), and that this area waste management plan--formed pursuant to Kentucky law--includes only counties in Kentucky and not other states. The County was required by Kentucky law to

distinguish between in-area and out-of-area waste to better enable each management area to plan for future waste disposal needs. The County has solicited its neighboring Kentucky counties to join an area management plan, as it could do under Kentucky law, and its plan therefore takes into account the waste disposal needs of those counties. Blue Ribbon has presented no evidence that the County's specific inclusion of Kentucky counties in its "out-of-area" designation constitutes an exclusion of non-Kentucky areas as possible sources of waste.

In *E. Ky. Res. v. Fiscal Court of Magoffin County*, 127 F.3d 532 (6th Cir. 1997), we ruled that the Kentucky statute that required counties such as Hardin County to create solid waste management plans was not facially discriminatory simply because it required counties to identify capacity for out-of-area waste. The court held that a distinction between the origins of waste was not equivalent to the discrimination between in-state and out-of-state waste prohibited by the Commerce Clause. *Id.* at 541. The court found that even if it accepted the plaintiff's contention that the "out-of-area" designation was simply another label for out-of-state waste, a contention the court rejected, the distinction was not discriminatory because it imposed no burden on the out-of-area waste. *Id.*

Judge Dalton's statements do not create a material issue of fact regarding a discriminatory purpose. Cases in which courts have held that a government action was motivated by a discriminatory purpose based their rulings on much more than three statements by one of nine decision-makers. In *SDDS, Inc.*, 47 F.3d at 268-70, for example, the Eighth Circuit relied upon the legislative history of an

enactment--replete with "protectionist rhetoric," the manner in which the challenged enactment was drafted, an official pamphlet with protectionist language, and the ineffective means utilized by South Dakota to achieve its purported end, to rule that the enactment was motivated by a discriminatory purpose. *Id.* Here, by contrast, Blue Ribbon relies on the deposition testimony, taken years after the fact, of one of nine voters on the Fiscal Court as its primary evidence of a discriminatory purpose. This alone is not sufficient to support an inference of purposeful discrimination. In *E. Ky. Res.*, 127 F.3d at 542-43, we rejected similar circumstantial evidence of purposeful discrimination by a governmental body holding that the plaintiff had failed "to show the effect of that evidence on the challenged statute." Likewise here, Blue Ribbon has not shown how or to what extent the purportedly discriminatory purpose of one member influenced the other eight members of the Fiscal Court.

The County's actions in establishing its own landfill and in denying Blue Ribbon's application are directed at a matter of local concern: the safe and efficient disposal of solid waste. The Fiscal Court justified its denial of Blue Ribbon's application by citing to the Commission's five reasons for opposing the application, and added that the proposed landfill would strain the abilities and equipment of the County's volunteer fire department. We cannot say that the burden imposed on interstate commerce by the County's denial of the permit is "clearly excessive" in light of the local concerns supporting the denial. *Pike*, 397 U.S. at 142. Indeed, Blue Ribbon has failed to demonstrate that the denial of its permit application has imposed *any* burden on interstate commerce.

We conclude that Blue Ribbon has failed to meet its burden to show that the County purposefully discriminated against interstate commerce or that the County's action fails the balancing test required by *Pike*. We therefore find that the district court did not err in granting summary judgment to the defendants on this claim.

V.

Blue Ribbon claims that the district court erred in holding that Hardin County did not violate Section 2 of the Sherman Antitrust Act by willfully acting to acquire and maintain a monopoly. Blue Ribbon contends that for purposes of this claim, the relevant market is Hardin County because of the economic realities of solid waste transportation and the Fiscal Court's political control over the County.

Section 2 of the Sherman Antitrust Act states: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States...shall be deemed guilty of a felony." 15 U.S.C. § 2. Illegal monopolization consists of "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966).

To meet the first requirement, Blue Ribbon must show that the County had the "power to control prices or exclude competition" in the relevant market. *Id.* at 571. The relevant

market in the context of solid waste disposal is not the area in which people produce solid waste but rather the competitive area for waste disposal services. *See C & A Carbone, Inc. v. Town of Clarkstown,* 511 U.S. 383, 390-91, 128 L. Ed. 2d 399, 114 S. Ct. 1677 (1994) (concluding that the article of commerce at issue in solid waste disposal cases is not always simply the solid waste itself but is often instead the services utilized to process and dispose of the waste). The area where waste disposal services are "reasonably interchangeable by consumers for the same purposes" is the relevant market. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395, 100 L. Ed. 1264, 76 S. Ct. 994 (1956). When determining the relevant market for waste disposal services, we look to the choices available to customers of such services and the extent of those choices. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 482, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992). Here then, to determine the relevant market, we must determine in what area in and around Hardin County waste disposal services can reasonably be offered in competition with services provided by Hardin County itself.

The district court rejected Blue Ribbon's argument that the relevant market was only Hardin County and that the Defendants controlled the entire market. The court ruled that the relevant market was broader and included the counties contiguous to Hardin County, extending at least seventy-five miles in all directions from the site of the landfill in Hardin County. Because Blue Ribbon failed to introduce evidence that the Fiscal Court controlled the siting of landfills outside of Hardin County, Blue Ribbon failed to show that the Fiscal Court monopolized the relevant market.

We agree with the district court. Blue Ribbon has offered no evidence that the relevant market consists only of Hardin County itself. In fact, Blue Ribbon's president stated that the relevant market extended for seventy-five miles around the landfill, and Blue Ribbon's application to the Fiscal Court listed the counties contiguous to Hardin County as the market from which Blue Ribbon's proposed landfill would draw waste. Thus, Blue Ribbon's own factual assertions point to a market broader than just Hardin County. Since residents within and without Hardin County can purchase landfill services from landfills both inside and outside of Hardin County, the relevant market extends beyond the County's borders.

Blue Ribbon offers no evidence contradicting the district court's factual findings. Instead, Blue Ribbon relies heavily on an earlier D.C. Circuit case to assert that Hardin County was itself an "essential facility" to which Blue Ribbon needed access to compete. In *Hecht v. Pro-Football, Inc.*, 187 U.S. App. D.C. 73, 570 F.2d 982 (D.C. Cir. 1977), the court faced a suit by persons seeking an American Football League franchise and needing access to RFK Stadium in Washington, D.C. The plaintiffs sued the Washington Redskins and the District of Columbia Armory Board (the entity which operated RFK Stadium) claiming that the restrictive covenant in the Redskins' lease of the Stadium violated antitrust laws. *Id.* at 985. The major area of contention between the parties was the extent of the relevant market. *Id.* at 988. Defining the relevant geographic market as the "area of effective competition," *id.* (quoting *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 328, 5 L. Ed. 2d 580, 81 S. Ct. 623 (1961)), the court ruled that the relevant area was Washington, D.C. itself, because that was

the area in which consumers of football entertainment could "practicably turn." *Id.* at 989. The court also ruled that the plaintiffs were entitled to an "essential facility" instruction. *Id.* at 992-93. An essential facility is one that without the ability to use the facility competitors are economically unable to compete and the facility is such that it cannot be divided. *Id.*

Blue Ribbon argues that the county is itself an essential facility to which Blue Ribbon must have access to compete in the relevant market. This is a clever but unavailing argument. *Hecht* is distinguishable because in *Hecht,* if the plaintiffs had not been allowed access to RFK Stadium, they would have been excluded from the entire relevant market. Here, by contrast, Blue Ribbon has presented no evidence that its exclusion from Hardin County would entirely exclude it from the relevant market. Blue Ribbon has not shown that it cannot access the market by creating a landfill on any border of the County. Given the at least seventy-five mile radius of profitability for hauling solid waste to a landfill, and the less than seventy-five mile diameter of Hardin County, Blue Ribbon can still access the relevant market and thus the County is not an essential facility.

The second prong of a Section 2 claim requires Blue Ribbon to establish that the Fiscal Court and Commission wilfully acquired monopoly power in the relevant market through anticompetitive means. *Illinois ex rel. Burris v. Panhandle E. Pipe Line Co.*, 935 F.2d 1469, 1481 (7th Cir. 1991). But Blue Ribbon has offered no evidence that the Fiscal Court has monopoly power at all in the County in light of the Cabinet's ability and authority to override the Fiscal Court's decisions. If Hardin County cannot make

anticompetitive decisions itself, but instead must subject those decisions to the will of other independent authorities, Hardin County does not have the power to exclude competition or raise prices and is therefore not a monopolist. Furthermore, Blue Ribbon has failed to introduce evidence that the County acted through anticompetitive means. Rather, the County acted pursuant to state mandates to ensure that it had adequate solid waste capacity.

In sum, we hold Blue Ribbon has failed to carry its burden and show that the County violated Section 2. We therefore affirm the district court's grant of summary judgment to the defendants on this issue.

CONCLUSION

We are not deaf to Blue Ribbon's implicit cry of unfairness here. Blue Ribbon is not only being denied to opportunity to make the best use of its property--a use for which the property is geologically suited and for which the property was purchased--it is being denied that opportunity by the very body that will itself operate the kind of facility Blue Ribbon intended to operate. Fairness, however, is not the issue before us. And Blue Ribbon has not shown that the County's denial of the necessary permit works a taking under state law or violates either the Commerce Clause or the Sherman Act. Fair or not, the County's actions were not illegal. Accordingly, we **AFFIRM** the judgment of the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 3:95CV-851-S

[Filed August 28, 2000]

BLUE RIBBON PROPERTIES, INC.)
d/b/a LONG HOLLOW LANDFILL)
Plaintiff)
)
v.)
)
HARDIN COUNTY FISCAL COURT)
and HARDIN COUNTY PLANNING)
AND DEVELOPMENT COMMISSION)
Defendants)
)

MEMORANDUM OPINION

This matter is before the Court on cross-motions for summary judgment made by both the Defendants, Hardin County Fiscal Court and Hardin County Planning and Development Commission (collectively, "Hardin County"), and the Plaintiff, Blue Ribbon Properties, Inc. ("Blue Ribbon"). Plaintiff alleges that Defendants have violated federal antitrust laws and have committed an inverse taking by refusing to grant Plaintiff a permit to operate a landfill in

Hardin County, Kentucky. The Court has previously set forth the relevant facts in its Memorandum Opinion of November 27, 1996. For the reasons that follow, Plaintiff's motion will be denied and Defendants' motion will be granted by separate order.

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). A party's failure to establish an element of proof essential to his case and upon which he will bear the burden of proof at trial constitutes a failure to establish a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). *See also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Section 1 Antitrust Claim

Count IV of Plaintiff's Amended Complaint alleges that the Defendants violated Section 1 of the Sherman Antitrust Act, which states: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared illegal." 15 U.S.C. § 1. A plaintiff seeking to establish a Section 1 violation must prove two essential elements: "(1) That defendants entered into a contract, combination or conspiracy; and (2) That such contract, combination or conspiracy amounted to an unreasonable restraint of trade or commerce among the several States." *Continental Cablevision of Ohio, Inc. v.*

American Electric Power Company, 715 F.2d 1115, 1118 (6th Cir. 1983).

Blue Ribbon claims that Hardin County conspired with the Commonwealth of Kentucky's Natural Resources and Environmental Protection Cabinet ("Cabinet"), and that this conspiracy amounted to an unreasonable restraint of trade. Blue Ribbon's argument on this claim contains numerous allegations of wrongdoing by Hardin County, but the only evidence it has presented to this Court of a conspiracy between Hardin County and the Cabinet is a letter Blue Ribbon received from the Cabinet on October 2, 1995.

In that letter, the Cabinet informed Blue Ribbon that its landfill application would probably not be approved at the conclusion of the permitting process. The Cabinet stated that because Hardin County had found Blue Ribbon's proposed landfill to be inconsistent with Hardin County's solid waste management plan, approval of Blue Ribbon's permit application was unlikely. The Cabinet acknowledged that it had the ability to override Hardin County's denial of the permit, but stated that it was unlikely it would have a need to override the denial "given the capacity needs identified in the Hardin County plan; the other elements of the Hardin County plan; and the provisions of the statewide solid waste reduction and management plan." Plaintiffs Exhibit 9.

Blue Ribbon asserts this "legitimized" Hardin County's improper actions, and that somehow this "'acquiescence' amounts to participation in concerted, collaborative action intended to support, reinforce, and effectuate the plan to restrain commerce and competition in the area of solid waste management." Plaintiffs Motion for

Summary Judgment at 17. The Court disagrees. Plaintiff has presented no evidence that the Cabinet's decision to not override Hardin County's denial of Blue Ribbon's application was for reasons other than those stated in the letter. Plaintiff has presented no evidence of any agreement, express or implied, between the Cabinet and Blue Ribbon that would amount to a conspiracy. If we were to accept Plaintiffs argument, any denial of a landfill application by a county that was subsequently affirmed by the Cabinet would be subject to antitrust claims. The mere fact that the Cabinet affirmed Hardin County's denial does not begin to establish a conspiracy between the two entities. As Blue Ribbon cannot prove the first element of a Section 1 antitrust claim, summary judgment will be granted in the Defendants' favor on Count IV of Plaintiff's Amended Complaint.

Section 2 Antitrust Claim

Count V of the Amended Complaint asserts that Hardin County violated Section 2 of the Sherman Antitrust Act, which reads as follows:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony ....

15 U.S.C. § 2. The elements of a claim under this section are: "'(1) possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a

consequence of superior product, business acumen or historic accident.'" *Tarrant Service Agency, Inc. v. American Standard, Inc.*, 12 F.3d 609, 613 (6th Cir.1993)(quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966)). "Illegal power must be appraised in terms of the competitive market for the product." *United States v. E.I. Du Pont De Nemours & Company*, 351 U.S. 377, 393 (1956).

The relevant market for antitrust purposes is determined by the choices available to consumers. *Eastman Kodak Company v. Image Technical Services, Inc.*, 504 U.S. 451, 481-482 (1992). In other words, the market is those "commodities reasonably interchangeable by consumers for the same purposes." *United States v. E. I. Du Pont De Nemours & Company*, 3 51 U.S. 377, 395 (1956). Plaintiff asserts that the relevant market in this case is Hardin County, and that the Defendants control that entire market.

Blue Ribbon's contention is apparently based on the fact that the Defendants currently operate the only landfill in Hardin County, and Blue Ribbon's application for a landfill permit was denied. The evidence before the Court, however, shows that the relevant market is much broader. In its own permit application to operate a landfill, Blue Ribbon listed its sources of waste for its proposed landfill as "Residential, institutional, commercial, and industrial waste without case by case approval from Hardin, Nelson, Lame, Bullitt, and Hart Counties in Kentucky." Executive Summary, Application No. 89-626, November, 1992, p.5. The landfill operated by the Defendants in Hardin County is permitted to accept waste from 34,different counties in Kentucky. Blue Ribbon agrees that the market for waste processing extends for a distance of seventy-five miles in all directions of landfill, The relevant

market in this case is thus broader than merely Hardin County.

As the relevant market is broader than Hardin County, Plaintiff has failed to present any evidence that the Defendants are able to control the development of landfills outside of Hardin County that could serve the waste management needs of the relevant market. In fact, the Defendants are only able to grant or deny permit applications within Hardin County, and any denial by the Defendants could be overridden by the Cabinet. Therefore, Plaintiff has not shown a genuine issue of material fact that the Defendants enjoy monopoly power within the relevant market, and summary judgment will be granted in Defendants' favor.

Parker Immunity

In its motion, Hardin County has asked this Court to reconsider its Memorandum Opinion and Order of November 27, 1996, in which we rejected Hardin County's claim of state-action immunity under *Parker v. Brown,* 317 U.S. 341 (1943). As we have already found that Hardin County is entitled to summary judgment on Blue Ribbon's antitrust claims, it is unnecessary to reconsider our previous decision.

Inverse Condemnation

Blue Ribbon claims that the Defendants' denial of its permit to operate a landfill constitutes an inverse condemnation of its property. A claim for inverse condemnation is a suit against a government to recover the fair market value of property which has *in effect* been taken by the activities of the government. *Commonwealth, Natural*

Resources and Environmental Protection Cabinet v. Stearns Coal and Lumber Company, 678 S.W.2d 378 (Ky. 1984). A "taking" is "the entering upon private property and devoting it to public use so as to deprive the owner of all beneficial enjoyment." *Id.*

Hardin County's denial of Blue Ribbon's application for a landfill permit does not deprive Blue Ribbon of all beneficial enjoyment of its property. It only denies Blue Ribbon the ability to use the property as a landfill. In contrast, in *Stearns Coal,* the landowner's property would have "remain[ed] practically untouched and in a primitive natural state," had the statute in that case been fully executed. *Id.* at 381. Such is not the case here. Blue Ribbon is free to develop its property in any way, except for use as a landfill. While Blue Ribbon may have been denied the most lucrative use of its property, this does not mean that the property has been subjected to an inverse condemnation. Accordingly, summary judgment will be granted in Defendants' favor on this claim.

Conclusion

Defendants' Motion for Summary Judgment will be granted as to Plaintiff's Section 1 antitrust claim because Plaintiff has failed to show sufficient evidence of a conspiracy, and on Plaintiffs Section 2 antitrust claim because Plaintiff has failed to Show Defendants control monopoly power in the relevant market. Summary judgment will also be granted for Defendants on Plaintiff s inverse condemnation claim because Plaintiff has not been denied all beneficial enjoyment of its property. Plaintiffs Motion for Summary Judgment will be denied.

This 28th day of August, 2000.

CHARLES R. SIMPSON III, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 3:95CV-851-S

[Filed August 28, 2000]

BLUE RIBBON PROPERTIES, INC. d/b/a LONG HOLLOW LANDFILL *Plaintiff*	)
v.	)
HARDIN COUNTY FISCAL COURT and HARDIN COUNTY PLANNING AND DEVELOPMENT COMMISSION *Defendants*	)

ORDER

For the reasons set forth in the memorandum opinion entered this date and the court being otherwise sufficiently advised, **IT IS HEREBY ORDERED AND ADJUDGED** that the Motion for Partial Summary Judgment of the Plaintiff is **DENIED**, and the Motion for Summary Judgment of the Defendants is **GRANTED**. The Plaintiffs Complaint is **DISMISSED** with prejudice as to all counts and all defendants.

This 28th day of August, 2000.

CHARLES R. SIMPSON III, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 3:95CV-851-S

[Filed November 27, 1996]

BLUE RIBBON PROPERTIES, INC. d/b/a LONG HOLLOW LANDFILL
Plaintiff

v.

HARDIN COUNTY FISCAL COURT

HARDIN COUNTY PLANNING AND DEVELOPMENT COMMISSION
Defendants

MEMORANDUM OPINION

Blue Ribbon Properties, Inc. d/b/a Long Hollow Landfill ("Long Hollow") was denied a permit to build and operate a landfill in Hardin County, Kentucky. This lawsuit is the result. Long Hollow sued the Hardin County Fiscal Court, the Hardin County Planning and Development Commission (jointly, "the County"), and the Kentucky Natural Resources and Environmental Protection Cabinet for

their roles in the application process. The Cabinet was dismissed by an order of the court entered April 30, 1996. Before us presently is the County's Motion for Summary Judgment. For the reasons explained in this Memorandum Opinion, the County's motion will be granted in part and denied in part.

FACTS

Long Hollow owns property in Hardin County, Kentucky. The Hardin County Fiscal Court ("Fiscal Court") is the governing body of Hardin County, and supervises the Solid Waste Management Area which includes Hardin County and Fort Knox, Kentucky. The Hardin County Planning and Development Commission ("Planning Commission") administrates planning and zoning ordinances in Hardin County. The Natural Resources and Environmental Protection Cabinet (the "Cabinet") is an agency of the Commonwealth of Kentucky with powers and duties regarding the licensing of waste disposal sites in Kentucky.

In 1989, Long Hollow purchased approximately 590 acres in Hardin County for the purpose of building and operating a solid waste landfill. In October 1989, Long Hollow submitted a state landfill permit application to the Cabinet and submitted a conditional use zoning application to the Planning Commission — the two steps required to get approval for a landfill. After extensive hearings, the Planning Commission voted to deny the application on February 5, 1991. Long Hollow appealed the decision to the Fiscal Court, which affirmed the denial in March 1991.

Long Hollow filed suit in Hardin Circuit Court (No. 91-CI-519) seeking: 1) a declaration that the zoning ordinance and the actions of the County thereunder were unlawful, and 2) damages under 42 U.S.C. § 1983. On April 2, 1993, the Hardin Circuit Court ruled in favor of Long Hollow, declaring the ordinance invalid and vacating the Fiscal Court's denial of Long Hollow's conditional- use application. However, the Hardin Circuit Court held for the County on Long Hollow's § 1983 claim, stating that the County is not a "person" within the meaning of § 1983.

During the pendency of that lawsuit, the Fiscal Court was busy with a landfill project of its own. In September 1991, the Fiscal Court contracted to buy 1,375 acres of land in order to develop a landfill. The zoning ordinance exempted county-owned property, so the landfill proposed by Fiscal Court needed to satisfy only the state permit requirements. Meanwhile, the Kentucky General Assembly passed legislation in 1991 requiring each county to prepare a solid waste plan and to name the facilities available for solid waste disposal. Responsive to this mandate, the County crafted Part I of the Hardin County Solid Waste Management Plan. The Plan noted the rejection of Long Hollow's application by the Planning Commission and Fiscal Court.

The Kentucky Court of Appeals affirmed the Hardin Circuit Court's ruling that the zoning ordinance and planning system were unlawful, and, on May 31, 1995, the Kentucky Supreme Court denied the Fiscal Court's request for discretionary review. In light of the final judgment, Long Hollow submitted a request to the Fiscal Court for reconsideration of its permit application. On July 24, 1995, the Fiscal Court again rejected Long Hollow's project. The

Fiscal Court cited the incompatibility of the project with the County's Solid Waste Management Plan, and noted that it intended to own and operate its own landfill. Relying on this second rejection by the Fiscal Court, the Cabinet denied Long Hollow's *state* application. Long Hollow points out the circularity of the County's decision making:

> In effect, the Fiscal Court rejected Long Hollow's [second] landfill project based on the provisions in the Solid Waste Plan which are based on [the first] zoning decision now adjudged to be unlawful and invalid. (Complaint (¶ 19))

This lawsuit was filed on December 27, 1995. Long Hollow complains that the County's actions: (1) were a regulatory taking of private property without just compensation in violation of the First and Fourteenth Amendments to the United States Constitution; (2) deprived Long Hollow of its constitutional rights to due process of law in violation of 42 U.S.C. § 1983 (3) amounted to a conspiracy to restrain and monopolize trade in violation of 15 U.S.C. §§ 1, 2; (4) restricted interstate commerce in violation of the Commerce Clause of the United States Constitution; and (5) tortiously interfered with Long Hollow's prospective advantageous business relationship. In deciding this motion, we consider separately each of Long Hollow's claims.

DISCUSSION

We first compelled to comment on Long Hollow's unwavering insistence that a "lack of discovery" should somehow incline the court to view Long Hollow's opposition

to the motion more favorably because, while we may not now find merit in certain claims, the fruits of discovery might change our opinion. We direct Long Hollow's attention to Rule 56(f) of the Federal Rules of Civil Procedure. Rule 56(f) states:

> Should it appear from the affidavits of a party opposing the motion that the party cannot *for reasons stated* present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(emphasis added). Of course, a party opposing a motion for summary judgment is not always be required to file a Rule 56(f) affidavit in order to receive the protection of the rule; it is at the discretion of a district court. *See, e.g., Snook v. Trust Co. of Georgia Bank of Savannah, N.A.*, 859 F.2d 865 (11th Cir. 1988). We are far more concerned with justice than the technicalities of Rule 56(f). *Id.* at 871 ("Form is not to be exalted over fair procedures.")

However, we simply cannot accept Long Hollow's mere suspicion and belief that something in their favor might turn up if more discovery were allowed. Delaying summary judgment requires a more-particularized justification through articulated reasons why more discovery is needed and what the party seeks to accomplish. *See Vance v. United States*, 90 F.3d 1145, 1149-50 (6th Cir. 1996) (by "set[ting] forth precisely what was needed and why" — not mere

"generalized statements" — a party might get additional discovery even in the absence of a Rule 56(f) affidavit); *Plott v. General Motors,* 71 F.3d 1190, 1196 (6th Cir. 1995) (in order to preserve argument that grant of summary judgment was too hasty and precluded necessary discovery, a party must have Complied with Rule 56(f) by submitting affidavits stating that party cannot "*for reasons stated*" present by affidavit facts essential to justify party's opposition); *Canaday v. Kelley,* 1994 WL 567512, *6 (6th Cir. October 14, 1994) (affidavit attached to the plaintiff's brief in opposition to the motion for dismissal or summary judgment mentioned only his belief that further discovery would reveal a pattern of discrimination, but lacked the requisite *particularity* required by Rule 56(f)); *Emmons v. McLaughlin*, 874 F.2d 351,357 (6th Cir. 1989) (the "lack of specificity, without any apparent justification on the face of Appellant's affidavit, gave the district court ample reason to deny additional discovery").[1]

Therefore, we decline to postpone the adjudication of this motion or to adjust the standard in Fed. R. Civ. P. 56 for deciding a motion for summary judgment. Rule 56 (c)

---

[1] Long Hollow's Response to this motion argues ten times that an absence of discovery impairs its ability to defend the instant motion. These recitations, however, are hopelessly vague and unspecific. Many of Long Hollow's statements resemble the following: "Given the opportunity to conduct discovery, Blue Ribbon will produce evidence that will show there is no true rational basis for the County's actions." (Response at 24). It is fundamental that the mere promise to produce admissible evidence at trial does not to defeat summary judgment. *Garside v. Osco Drug Inc.,* 895 Fi2d 46, 49 (1st Cir. 1990). Rule 56 ,mid Sixth Circuit case-law require more specificity than Long Hollow offers.

provides that summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In *Anderson v. Liberty Lobby,* 477 U.S. 242, 251-52, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986), the Supreme Court noted that Rule 56(c) asks "whether the evidence presents a sufficient disagreelnent to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Summary judgment is appropriate where there is no genuine issue of material fact inthe case which requires a trial. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 106.S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

I. The Regulatory Takings Claim

Count I alleges that the County violated the Fifth and Fourteenth Amendments by denying Long Hollow the "economically viable use of its property" and accomplishing a regulatory taking of Long Hollow's property without due process of law and just compensation. Long Hollow points to a "constitutionally protected distinct investment-backed interest in the use of its property for the lawful purpose of constructing and operating [ ] a solid waste landfill." Complaint, ¶ 24. The County argues that Long Hollow's takings claim is not ripe – and should be dismissed – because Long Hollow has failed to exhaust its available state remedies. We agree with the County.

In *Green v. City of Williamstown,* 848 F. Supp. 102 (E.D. Ky. 1994), the court recognized that a property owner's federal claim is not ripe until the owner has invoked

state procedures and been refused just compensation. Long Hollow has made no attempt to avail itself of the state law remedies guaranteed by Section 242 of the Kentucky Constitution. *See, e.g., Kentucky State Park Comm'n v. Wilde,* 76 S.W.2d 4 (1934). Where a takings claim is not ripe, a federal court must dismiss it for lack of subject matter jurisdiction. *Bigelow v. Mich. Dept. of Nat. Resources,* 970 F.2d 154, 157-58 (6th Cir. 1992).

Long Hollow attempts to avoid this result by arguing that Kentucky's takings remedy is not "reasonable, certain and adequate." Where a state remedy is not "reasonable, certain and adequate," a plaintiff need not pursue the remedy, and may proceed directly to federal court. *Kruse v. Village of Chagrin Falls, Ohio*, 74 F.3d 694, 700 (6th Cir. 1996) (observing that Ohio has no statutory or constitutional guarantee to compensation). Nowhere in its pleadings or brief, however, does Long Hollow explain or allege in what respect Kentucky's procedure is not "reasonable, certain and adequate" to afford a landowner a remedy for the taking of his property. The Kentucky Constitution *guarantees* Long Hollow the right to prosecute an inverse condemnation action, but Long Hollow has files no such suit. Long Hollow offers no authority or precedent to indicate why the requirement to exhaust available state remedies should be waived in this case. Therefore, summary judgement will be granted as to Long Hollow's regulatory taking claim. *See Bigelow, supra.*

II. The 42 U.S.C. § 1983 Claim

Count II alleges a violation of 42 U.S.C. § 1983 Section 1983 provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Long Hollow alleges two separate deprivations of its Fourteenth Amendment rights. *First*, Long Hollow contends that the County's denial of a landfill permit was a deprivation of property without due process of law. Long Hollow charges that the County "unreasonably, arbitrarily and capriciously" interfered with Long Hollow's property interests. Complaint, ¶ 3. *Second,* Long Hollow contends that the County relied on an unconstitutional ordinance to deny a permit and then used that decision as its only basis to deny the permit a second time. Long Hollow charges that this violates substantive due process. *Id.*, ¶ 32.

We do not reach the merits of these contentions, however, because Collateral estoppel prevents the re-litigation of an issue lost by Long Hollow in its state-court lawsuit. Simply, the Hardin Circuit Court already decided the question of whether the County is a "person" under 42 U.S.C. § 1983. The Constitution requires that we give full faith and credit to this decision.

Two separate doctrines must be considered "res judicata" refers to preclusion of a claim, while "collateral estoppel" refers to preclusion of an issue.

A. Res Judicata

The County's first argument is that res judicata bars the re-litigation of claims actually litigated and all claims that could have been litigated in a prior lawsuit between identical parties. *See Kane v. Magna Mixer Co.*, 71 F.3d 555, 560 (6th Cir. 1995)(res judicata has four elements: (1) a final decision on the merits by a court of competent jurisdiction; (2) a subsequent action between the same parties or the privies; (3) an issue in the subsequent action which was litigated or which should have been litigated in the prior action; and (4) an identity of the causes of action). The County argues that Long Hollow's state-court § 1983 action included or should have included all the issues alleged in the County's present federal § 1983 action, and is therefore barred by res judicata.

The county ignores the gravamen of Long Hollow's present § 1983 claim. Long Hollow's in large part, on the conduct of the County *after* the state court's adjudication in 1993. *See, e.g.*, Complaint, ¶ 15 ("In May 1993, after the Hardin County Circuit Court rendered its judgment vacating the Long Hollow zoning denial. . ."). *See also* Complaint, ¶¶ 17, 18, 19, 30, 32. The factual predicate for this § 1983 did not exist during the prior state court suit. We do not find the identity of issues and identity of cause of action that would bar this § 1983 action under res judicata. *Kane, supra.* Thus, res judicata does not bar Long Hollow's present § 1983 claim.

B. Collateral Estoppel

However, the doctrine of collateral estoppel prevents the re-litigation here of an issue crucial to Long Hollow's § 1983 claim. That issue is whether the County is a "person" for purposes of 42 U.S.C. § 1983. Collateral estoppel requires that "once a court decides an issue of fact or law necessary to its judgment, that decision precludes re-litigation of the same issue on a different cause of action between the same parties." *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 467 n. 6, 102 S. Ct. 1883, 72 L. Ed, 2d 262 (1982). Long Hollow's present § 1983 claim is barred by the judgment of the Hardin Circuit Court on April 26, 1993 in Long Hollow's state-court lawsuit. In its opinion, the Hardin Circuit Court dismissed Long Hollow's § 1983 claim, ruling that the County was not a "person" as that term is meant in 42 U.S.C. § 1983 because Kentucky law extends sovereign immunity to counties as political subdivisions of the state. *See* Opinion and Summary Judgment at 21-23 *(citing Will v. Michigan Dept. of State Police,* 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989)). [2]

In *Allen v. McCurry,* 449 U.S. 90, 101 S. Ct. 411, 66 L. Ed. 2d 308 (1980), the Supreme Court specifically held that a prior state-court judgment has res judicata and collateral estoppel effect in subsequent § 1983 litigation. McCurry had been a state-court criminal defendant where he challenged the admissibility of evidence gained through an allegedly unconstitutional search and seizure. After a suppression

---

[2] The Hardin Circuit Court ruled, in the alternative, that 42 U.S.C. § 1983 requires a deliberate act, which Long Hollow failed to establish. *Id.*

hearing the state court ruled that the search was lawful and admitted the evidence. McCurry was convicted. McCurry later filed a § 1983 action in federal court for money damages against the officers who conducted the search. The Supreme Court held that collateral estoppel precluded the re-litigation of the constitutionality of the search and seizure, noting that 28 U.S.C. §1738 [3] requires federal courts to give the same effect to prior state-court decisions as would the courts in the state where the decisions were rendered. 449 U.S. at 97-98. The Court observed that "nothing in the language of §1983 remotely expresses any congressional intent to contravene the common-law rules of preclusion or to repeal the express statutory requirements of the predecessor of 28 U.S C. § 1738."

Kentucky law would clearly apply collateral estoppel to the § 1983 claim before us. In *Bd. of Educ. of Covington v. Gray,* 806 S.W.2d 400 (Ky. App. 1991) the Kentucky Court of Appeals noted that collateral estoppel applies if: (1) the issue was actually litigated in the prior proceeding, and (2) the losing party had a full and fair opportunity to contest the issue. *Id.* at 402. Both of these requirements are met in the present case. The Hardin Circuit Court's Opinion and Summary Judgment specifically addressed whether the County was a "person" within the meaning of § 1983. Long Hollow has made no allegation that the Hardin Circuit Court proceedings failed to provide a full and fair opportunity for a hearing on the issue. When the County appealed the court's

---

[3] [J]udicial proceedings [of any court of any state] shall have the same full faith and credit in every court within file United States and its Territories and Possessions as they have by law or usage in the courts of such state. . ." 28 U.S.C. § 1738.

ruling on the constitutionality of the zoning scheme, Long Hollow took no cross-appeal of the § 1983 claim's dismissal. The mandates of 28 U.S.C. § 1738, *Allen v. McCurry,* and Kentucky law are clear: collateral estoppel prevents Long Hollow from re-litigating the Count's status as a "person" under § 1983. Summary judgment will be granted on Long Hollow's § 1983 claim.

III. The Antitrust Claims

Counts IV and V allege that the County, violated the Sherman Act, 15 U.S.C. §§ 1 and 2. Section 1 of the Sherman Act prohibits conspiracies, combinations, or contracts in restraint of trade. Long Hollow contends that the County and Cabinet violated Section 1 by "preventing the disposal of solid waste in privately owned landfills located in Hardin County for the present and foreseeable future" and "act[ing] unreasonably in restraint of flee interstate trade or commerce." *Id.*, ¶¶ 44, 48.

Section 2 of the Sherman Act prohibits monopolization and attempted monopolization. Long Hollow alleges that the County monopolized or attempted to monopolize solid waste disposal in Hardin County by using the Solid Waste Management Program to preclude Long Hollow and all private entities from owning landfills in Hardin County. *Id.*, ¶ 51.

The County's Motion for Summary Judgment relies entirely on the state-action defense announced by the Supreme Court in *Parker v. Brown*, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 2d 3 15 (1943). In *Parker*, the Court held that "nothing in the language of the Sherman Act or in its history

. . . suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." *Id.* at 350-51. Thus, the Sherman Act impliedly exempts restraints on trade imposed as an "act of government." *Id.* at 352.

Parker v. Brown immunity is applied to cities and counties only if their actions meet a rigorous standard. In *Community Communications Co., Inc. v. City of Boulder,* 455 U.S. 40 102 S Ct 83 570 L. Ed. 2d 810 (1982), the Supreme Court recognized that political subdivisions or municipalities can "partake of the *Parker* exemption only to the extent that they acted pursuant to a clearly articulated and affirmatively expressed state policy." 455 U.S. at 54. *See also City of Lafayette v. Louisiana Power & Light Co.,* 435 U.S. 389, 413, 98 S. Ct. 1123, 55 L. Ed. 2d 364 (1978) (Brennan, J., concurring) (the *Parker* doctrine immunizes acts of government by the state's subdivision only pursuant to "state policy to displace competition with regulation or monopoly public service").

In Sproul v. City *of Wooster,* 840 F.2d 1267, 1269 (6th Cir. 1988), the Sixth Circuit stated:

> To determine whether the City acts pursuant to a state policy, it is necessary to examine the statutory" scheme under which it acts. Explicit legislative authorization for anticompetitive acts is not necessary: it is sufficient that the state bestows "broad regulatory authority" from which anticompetitive effects would logically result.

Id. at 1269 (citing *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 41-43, 105 S Ct. 1713, 85 L.Ed. 2d 24 (1985)). It is clear that merely having the legal authority to engage in the challenged activities is insufficient, but "the Court [has] left unclear the degree of specificity in state law necessary to satisfy the standard applied to a nonsovereign state representative" like the County. *Hybud Equip. Corp. v. City of Akron*, 742 F.2d 949, 959 (6th Cir. 1984).

Community Communications and *Lafayette* were recognized and applied by the Sixth Circuit in *Hybud Equip. Corp. v. City of Akron*, 742 F.2d 949, 959 (6th Cir. 1984). *Hybud* illustrates the method of analysis used in a case of Parker immunity for counties. At one end of the spectrum is the "easy" case where, a restraint on competition is *required* in a legislative scheme and the state fosters a policy to displace competition. But where the restraint is not required:

> the court must examine the relationship between the restraint and the regulatory aims of the state. If the challenged actions bear an attenuated relationship to the statutory aims and the express powers so delegated, the actions cannot be deemed to have resulted from a clearly articulated and affirmatively expressed state policy to displace competition . . . Absent express legislative direction for such a restraint, the regulation is not protected as state action under *Parker* [citation omitted].
>
> If the challenged anticompetitive restraint of a nonsovereign state representative, for which there is no express

> stautory provision, is necessary to carry out the representative's mandate, then a legislative intent to displace competition may be inferred from the legislature's delegation of authority,

Hybud, 742 F.2d at 960.

We do not believe that the County has met its burden to show that its allegedly anticompetitive activities were done "pursuant to a clearly articulated and affirmatively expressed state policy" or "necessary to carry out the [County's] mandate" Hybud requires a better showing than the County has made.[4]

The County argues that all of its actions were done in fulfillment of its duty under KRS 224.43-340 to establish and develop a solid waste management plan. However, Kentucky's statutory scheme does not require or direct that the County itself govern the permitting of solid waste

---

[4] To aid in the application of *Parker* immunity, the Supreme Court has also considered the degree to which the state "actively supervises" the policy. *California Retain Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105, 100 S. Ct. 937, 63 L.Ed. 2d 233 (1980). The Cabinet's acquiescence in the County's actions does not make a sufficient case in itself for *Parker* immunity. In *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 96 S. Ct. 3110, 49 L. Ed. 2d 1141 (1976), file Supreme Court declined to extend *Parker* immunity, finding that the state's mere acquiescence in a municipal practice is not in itself sufficient grounds to rule that the action was based on any stale policy. Here, the Cabinet's mere approval of the County's solid waste plan does not confer *Parker* immunity.

landfills. More importantly, KRS 224.43-345 lists the requirements of a county's solid waste plan but articulates no preference for the displacement of ordinary competition in favor of government regulation. In fact, KRS 109.010(8)(titled "Local Solid Waste Management") establishes the County's limit of authority over solid waste inanagement. This statute explicitly states:

> It is not the intent of this chapter to prohibit or discourage the participation of the private sector in any aspect of solid waste management. Moreover, it is preferable for solid waste management functions to be performed by the private sector when it is in the best interests of the public and conforms with the policies and provisions in this chapter.

Kentucky has never articulated a desire to replace competition with government action. Although the statute delegates to the County the duty to write a solid waste plan, the County "in exercising [its] delegated power must obey the antitrust laws." *See City of Lafayette*, 435 U.S. at 416.

The only issue regarding Long Hollow's antitrust claims that was raised and briefed by the County was the issue of Parker immunity. We reject the County's sweeping assertion that "any conduct by the County was taken pursuant to statutory authority, thereby providing [*Parker*] immunity for anti-trust liability." Summary judgment will be denied on Long Hollow's antitrust claims.

IV. The Commerce Clause Claim

Count III alleges that the County violated the Commerce Clause of the United States Constitution.[5] Long Hollow contends that the County violated the Commerce Clause by: (1) denying Long Hollow a landfill permit, and (2) "enacting, approving and enforcing a Solid Waste: Management Plan which expressly precludes Long Hollow or any other private entity from owning a solid waste landfill in Hardin County." Complaint ¶ 36 Long Hollow argues that the actions of the County discriminate against and impose substantial burdens on interstate commerce. *Id.*, ¶ 38.

The Commerce Clause prohibits states and localities from imposing unreasonable burdens on interstate commerce. *Minnesota v. Cloverleaf Creamery Co.*, 449 U.S. 456, 101 S.Ct. 715, 66 L.Ed. 2d 659 (1981). The Supreme Court distinguishes between two types of state regulations burdening interstate commerce: *first*, some regulations directly burden commerce or facially discriminate between in-state and out-of-state interests; *second*, some facially-neutral regulations burden commerce only incidentally. "Direct" burdens are *per se* invalid unless they are both necessary and unrelated to economic protectionism. *See Maine v. Thiboutot*, 448 U.S. 1, 100 S. Ct. 2502, 65 L. Ed. 2d 555(1980). "Incidental" burdens are tested by the *Pike* balancing test. *Pike v. Bruce*

---

[5] The Commerce Clause grants Congress the power "[t]o regulate Commerce. . . among the several states. . ." U.S. CONST., art. I,§ 8. Long Hollow's Complaint concerns what is known as the "negative" Commerce Clause: that is, the *states* may not regulate commerce so as to interfere with the constitutional grant of authority vested in the United States Congress.

Church, 397 U.S. 137, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970).

Long Hollow has not alleged any facts that would support its Commerce Clause claim. Nowhere is it shown how the County discriminated — facially or incidentally— against out-of-state waste or landfill operators in the design and implementation of the Hardin County Solid Waste Plan. Moreover, none of Long Hollow's cited authorities supports its claim In *C & A Carbone, Inc. v. Town of Clarkstown,* NY, 511 U.S. 383, 114 S. Ct. 1677, 128 L. Ed. 2d 399 (1994), the town adopted a requirement that all solid waste, regardless of its origin, be processed at a town-approved transfer station before leaving the town. *Id.* at I682. The Supreme Court found the ordinance discriminatory, emphasizing that "[d]iscrimination against interstate commerce in favor of local business or investment is *per se* invalid, save in a narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." *Id.* (citations omitted). *Carbone* is similar to this case only in that both cases' plaintiffs handled waste. Nowhere in the Solid Waste Management Plan are there differing standards of qualification or varying treatment given to permit applicants based on the situs of the company or the origin of the waste. Nothing in the "practical effect and design" of the County's waste plan implicates the concerns of the Negative Commerce Clause.

Long Hollow suggests that an intent to discriminate against interstate commerce is evidenced by the denial of a permit to Long Hollow. Certainly every state or local regulatory decision will have some effect on interstate commerce. But the negative Commerce Clause proscribes

only *discriminatory* treatment of in-state and out-of-state entities. *See, e.g., Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 101 S. Ct. 1309, 67 L. Ed. 2d 5.80 (1981); *Philadelphia v. New Jersey*, 437 U.S. 617, 98 S. Ct. 2531, 57 L. Ed. 2d 475 (1978). It is also fundamental that the Commerce Clause protects interstate *markets*, not particular firms. *See Clover Leaf Creamery*, 449 U.S. at 475.

Generally, the regulatory requirements of a solid waste management plan — if not facially discriminatory — do not violate the Commerce Clause so long as they are reasonably related to local health-and-safety interests and do not unreasonably burden interstate commerce. *Kleenwell Biohazard Waste and General Ecology Consultants, Inc. v. Nelson*, 48 F.3d 391 (9th Cir. 1995). In *Kleenwell*, the Ninth Circuit upheld the district Court's summary judgment that a regulatory scheme requiring state certification for the collection and disposal of solid waste did not violate the Commerce Clause. Applying the *Pike* test, the court found no Commerce Clause violation because: (1) the state's interest in assuring the health and safety of its citizens outweighed any incidental burden on interstate cormnerce, (2) the scheme treated in-state and out-of state collectors the same, (3) out-of-state disposal was not prohibited, and (4)the scheme would deter the illegal dumping of solid waste. *Id.* at 399. *See also Niagara Recycling, Inc. v. Town of Niagara*; 443 N.Y.S. 2d 939, 949-50 (App. Div. 1981) (holding that a local law granting the town board the authority to issue or deny permits for waste-disposal facilitiesdid not impose an undue burden on interstate commerce in violation of the Commerce Clause, where the local law regulated evenhandedly without regard to the location of customers or the origin of the waste brought into the town).

Applying *Pike* and *Kleenwell*, it is clear that Long Hollow has not alleged any facts which override the "legitimate local concern" implicit in the Hardin County Solid Waste Management Plan of "ensuring the safe disposal of solid waste." *Kleenwell*, 48 F.3d at 398. The *Pike* standard is a rigorous one for plaintiffs "[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, *it will be upheld unless the burden imposed upon such commerce is clearly excessive in relation to the putative local benefits.*" *Pike*, 397 U.S. at 142 (emphasis added). Long Hollow has not articulated any reason why the alleged burden "is clearly excessive."

Long Hollow's unspecific allegations of a discriminatory effect on interstate commerce do not create a genuine issue of material fact under *Pike*. Summary judgment will be granted on Long Hollow's Commerce Clause claim.

V. The Tortious Interference Claim

Count VI alleges that the Fiscal Court intentionally interfered with Long Hollow's prospective business relationships by expressly stating in the Solid Waste Management Plan that Long Hollow was not to be considered as an option for future solid waste disposal in Hardin County. Complaint, ¶ 56.

It is unnecessary for us to reach the merits of Long Hollow's tortious interference claim because the County is immune to this claim under the Claims Against Local Governments Act, KRS 65.2003:

> Notwithstanding KRS 65.2001 [specific tort actions allowed against counties], a local government shall not be liable for injuries or losses resulting from:
>
> * * *
>
> (3) Any claim arising from the exercise of judicial, quasi-judicial, legislative or quasi-legislative authority or others, exercise of judgment or discretion vested in the local government, which shall include by example, but not be limited to:
>
> * * *
>
> (c) The issuance, denial, suspension, revocation of, or failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authorization....

The gravamen of Long Hollow's Complaint is that, as a result of the County's actions, the company was denied a state landfill permit. The plain language of KRS 65.2003 precludes Long Hollow's tortious interference claim arising from the permit's denial. Complaint, ¶ 59. KRS 65.2003(3)(c) specifically retains the County's immunity from the tortious interference claim which is announced in Section 231 of the Kentucky Constitution. *See generally Fryman v. Harrison,*

896 S.W.2d 908 (Ky. 1995); *Calvert Investments, Inc. v. Louisville & Jefferson County Metro. Sewer Dist.*, 805 S.W.2d 133 (Ky. 1991). Long Hollow does not offer any law to escape the County's immunity under the Claims Against Local Governments Act and Section 231 of the Kentucky Constitution. Therefore, summary judgment will be granted as to Long Hollow's tortious interference Claim.

CONCLUSION

For the reasons stated in this memorandum opinion, summary judgment will be granted in favor of the Hardin County Fiscal Court and the Hardin County Planning and Development Commission on Counts I, II, III, and VI of Long Hollow's Complaint. The County's motion will be denied as to Counts IV and V, because the County has failed to demonstrate its entitlement to the immunity from antitrust liability under *Parker v. Brown, supra*. An order in accordance with this Memorandum Opinion will be entered this date.

This 27th day of November, 1996.

/s/_____

CHARLES SIMPSON III, CHIEF JUDGE
UNITED STATES DISTRICT COURT

cc: Counsel of Record

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 3:95CV-851-S

[Filed November 27, 1996]

BLUE RIBBON PROPERTIES, INC. d/b/a LONG HOLLOW LANDFILL *Plaintiff*	)
v.	)
HARDIN COUNTY FISCAL COURT	)
HARDIN COUNTY PLANNING AND DEVELOPMENT COMMISSION *Defendants*	)

ORDER

For the reasons set forth in the memorandum opinion entered this date, and the court being otherwise sufficiently advised, **IT IS HEREBY ORDERED AND ADJUDGED** that the defendants' motion for summary judgment is **GRANTED IN PART AND DENIED IN PART.** The plaintiffs claims in Counts I, II, III, and VI of the Complaint

are hereby **DISMISSED**. Summary judgment is denied as to Counts IV and V-of the Complaint.

This 27th day of November, 1996.

/s/
CHARLES SIMPSON III, CHIEF JUDGE
UNITED STATES DISTRICT COURT

cc: Counsel of Record

APPENDIX F

SUPREME COURT OF KENTUCKY

[Filed May 31, 1995]

	95-SC-80-D (92-CA-2822)
Hardin County; Hardin County Fiscal Court; Hardin County Planning and Development Commission *Movants*	
v.	Hardin Circuit Court 91-CI-1554
Joan Jost; Animal Refuge Center, Inc. *Respondents*	
AND	95-SC-79-D (93-CA-1291) (93-CA-1099)
Hardin County; Hardin County Fiscal Court; Hardin County Planning and Development Commission *Movants*	
v.	Hardin Circuit Court 91-CI-519

Blue Ribbon Properties, Inc.,)
D/b/a Long Hollow Landfill)
Respondent)
_____)

ORDER DENYING DISCRETIONARY REVIEW

The motions, for review of the decision of the Court of Appeals are denied.

ENTERED May 31, 1995

/s/_____
CHIEF JUSTICE

APPENDIX G

COURT OF APPEALS OF KENTUCKY

No. 92-CA-2822-MR

[Filed January 6, 1995]

Discretionary Review Denied by Supreme Court May 31, 1995.

HARDIN COUNTY, Hardin County Fiscal Court, and Hardin County Planning and Development Commission,
Appellants,

v.

Joan JOST and Animal Refuge Center, Inc.,
Appellees.

JUDGES:
Before HOWERTON, HUDDLESTON, and JOHNSON, Judges.

OPINION

HOWERTON, JUDGE. Hardin County, Hardin County Fiscal Court, and Hardin County Planning and Development Commission ("the County") appeal from a judgment of the Hardin Circuit Court declaring the entire

Hardin County planning and zoning ordinance invalid and vacating the County's denial of the right of Joan Jost to use her property as an animal refuge center. We have considered the briefs and arguments, and agree with Judge Cooper's conclusions and the manner in which he described and resolved the legal questions. As a consequence, we set forth his statement of facts and a substantial portion of his legal analysis and adopt it as our own. We have added additional comments following Judge Cooper's opinion which we believe further explain our views.

1. *The Development Guidance System.*

On January 9, 1984 and pursuant to KRS 100.201, et seq., the Hardin Fiscal Court adopted a zoning ordinance for land use regulation in the unincorporated areas of Hardin County. That ordinance, known as the Development Guidance System, is said to be unique in the Commonwealth of Kentucky and, perhaps, in the United States. It admittedly does not follow the traditional approach of establishing separate zones for particular types of development with identifiable permitted and conditional uses. Instead, it designates the entire unincorporated area of the county as one zone, and designates three types of uses for that zone. Agricultural and single family residential uses are designated as "uses-by-right." Uses having a negative impact on the quality and supply of water, or which endanger public health, or historic sites, are designated as "prohibited uses" (as are certain flashing signs). Everything else is designated as a "conditional use." Conditional use is defined as "a use of land or activity permitted only after fulfillment of all local regulations." Thus, anyone desiring to use his property for any purpose other than agricultural or single family residential

use must obtain a conditional use permit. The Development Guidance System contains no provision for a board of adjustment, but vests the traditional functions of that board in the planning commission. Thus, the commission's functions include not only preparation of the comprehensive plan and any amendments, KRS 100.183, KRS 100.197, *City of Lakeside Park v. Quinn, Ky.*, 672 S.W.2d 666 (1984), but also the functions of a traditional board of adjustment, including hearing and deciding applications for conditional use permits. KRS 100.237(1).

For the purpose of determining whether to grant an application for a conditional use permit, the Development Guidance System first requires application of a "growth guidance assessment." This initial step involves the commission's evaluation of a land use proposal based upon a point system. Points are awarded on the basis of a project's proximity to previously developed areas and related amenities, as well as the suitability of the soil at the proposed site for agricultural purposes. If a proposal scores 150 points, it is automatically submitted for a "compatibility assessment." If a proposal fails to score 150 points, the planning commission reviews the application in a summary proceeding. If a proposal is rejected at that stage, an applicant may appeal to the commission for further review at a public hearing. If the commission determines that the site is suitable for development despite a score of less than 150 points on the growth guidance assessment, the project is also submitted for a "compatibility assessment."

The compatibility assessment involves an informal compatibility meeting of the applicant, surrounding property owners, and the commission's staff to discuss the proposed

development. This procedure is designed to create compromise, and problems relating to the proposed development are discussed and solutions proposed. If no consensus is reached, a public hearing is held, following which the commission decides whether to reject the proposal as incompatible or place conditions on the project in order to make it compatible. If the project is rejected at any stage, the applicant may appeal to the Hardin Fiscal Court for a de novo hearing and decision.

2. *The Jost Application.*

On April 17, 1985, Joan Jost purchased the first 7.25 acres of her property. The remaining 17.1423 acres were purchased on June 21, 1988. The testimony adduced at the planning commission hearing on August 6, 1991 was uncontroverted that Jost had established and was operating an animal refuge center on her property prior to September 18, 1989. (See letters of May 7 and May 11, 1987 to Jost (then Gnage) from Dennis A. Gordon, former director of the planning commission, and letter from Jost to Mr. Eubanks, dated March 1989 and introduced into the record by the attorney for the surrounding landowners.)

By letter of July 11, 1990 from Tim J. Asher, Gordon's successor as director of the planning commission, Jost was notified that, "Based on the information we received, it appears that a Conditional Use Permit is required for the operation of the Animal Refuge Center." By letter of June 5, 1991 from Asher, Jost was informed that she had seven days in which to seek a conditional use permit. Jost filed an application for the permit, and a compatibility meeting was scheduled for July 11, 1991. It appears that no growth

guidance assessment was ever made. No compromise was reached at the compatibility meeting, so the application was set for a public hearing on August 6, 1991. Following that hearing, Asher submitted a memorandum to the Commission, summarizing the evidence presented at the public hearing and the various options to be considered. As reflected in the minutes of its meeting of August 20, 1991, the commission voted to deny the conditional use permit.

Section 8.3 of the ordinance provides for an appeal from a decision of the planning commission to the fiscal court within fourteen days of the rendition of the commission's decision. On September 3, 1991, Jost filed her appeal to the fiscal court. A hearing was held on September 23, 1991; and on September 30, 1991, the fiscal court voted to affirm the decision of the commission. Jost filed this action on October 30, 1991.

. . . .

5. *Validity of the Ordinance.*

Zoning ordinances are an exercise of the police power of the state, and no subdivision thereof may exercise that power except through a grant made by the people of the state through its legislative branch. *Fowler v. Obier*, 224 Ky. 742, 7 S.W.2d 219, 223 (1928). It is elementary that to the extent that an ordinance conflicts with a provision of KRS chapter 100, it is invalid. *Hacker v. Baesler*, [Ky., 812 S.W.2d 706 (1991)] supra at 709; *Green v. Bourbon County Joint Planning Commission,* Ky., 637 S.W.2d 626, 629 (1982).

It is clear that in enacting KRS chapter 100, the legislature considered careful planning as a prerequisite of good zoning. *City of Erlanger v. Hoff, Ky.*, 535 S.W.2d 86, 88 (1976); *City of Louisville v. McDonald,* Ky., 470 S.W.2d 173 (1971); *Fritts v. City of Ashland,* Ky., 348 S.W.2d 712 (1961). A comprehensive plan must have general application throughout the community, so that the facts to be considered do not relate as such to a particular individual or the status of his property. *McKinstry v. Wells,* Ky. App., 548 S.W.2d 169, 173 (1977). Zoning must conform to planning, so as to prohibit indiscriminate, ad hoc zoning. *Manley v. City of Maysville,* Ky., 528 S.W.2d 726, 728 (1975); cf., *Lines v. Pinchbeck--Halloran Volkswagen, Inc.*, Ky., 513 S.W.2d 492, 494 (1974). Thus, in *Kindred Homes, Inc. v. Dean,* Ky. App., 605 S.W.2d 15 (1979), a comprehensive plan which relegated the entire unincorporated areas of Jessamine County to an agricultural zone, so that modifications could only be made piecemeal, was struck down as contrary to the very theory of zoning. And in *Rockhill v. Township of Chesterfield,* 23 N.J. 117, 128 A.2d 473 (1956), the supreme court of New Jersey struck down an ordinance almost identical to Hardin County's ordinance, holding that reserving the use of the whole of the area to agricultural and residential use, then providing for all manner of "special uses" was the antithesis of zoning. "It makes for arbitrary and discriminatory interference with the basic right of private property, in no real sense concerned with the essential common welfare." *Id.*, 128 A.2d at 479.

The comprehensive plan should be a plan for orderly growth, and property owners must be able to rely on it when making investments in real estate and for the protection of land values. *Bryan v. Salmon Corp.*, Ky. App., 554 S.W.2d

912, 917 (1977). In other words, a person investing in property ought to be able to look at the comprehensive plan and determine with some degree of reasonable certainty the use to which the property can be put before it is purchased. *Rockhill v. Township of Chesterfield, supra,* 128 A.2d at 480. In striking down certain provisions of the Kentucky Billboard Act, our supreme court declared those provisions void because they failed to put a particular property owner on notice as to whether his property was or was not subject to the statute. *Diemer v. Commonwealth, Transportation Cabinet, Ky.*, 786 S.W.2d 861, 865 (1990).

It is a corollary to the notice requirement that a zoning ordinance must contain standards to be used in determining whether to permit or deny a conditional use, so as not to vest absolute and arbitrary power in the administrative agency. *Carlton v. Taylor, Ky. App.*, 569 S.W.2d 679, 681 (1978). While application of the growth guidance assessment can place a prospective property owner on notice as to what uses cannot be made of the property, it cannot tell him with any degree of certainty whether any particular use can be made of the property. Even if the proposed use totals 150 points under those guidelines, the use still can be denied if enough neighbors can convince the planning commission members that the use is "incompatible" with their neighborhood. In fact, no growth guidance assessment was ever made in this case, perhaps because the growth assessment guidelines do not apply to all possible uses, *e.g.*, an animal refuge center. Thus, no standard was applied to this application, except whether the proposed use was compatible with the neighborhood. Basing zoning decisions solely on the complaints of neighbors ignores the basic premise of planning and zoning. "The effect of a zoning change on the value of

neighboring property is only one factor to be considered, and the purpose of zoning is not to protect the value of the property of particular individuals, but rather to promote the welfare of the community as a whole." *Fritts v. City of Ashland, Ky.*, 348 S.W.2d 712, 714 (1961). Could Jost have anticipated this result when she purchased her property? Even as late as 1987, the director of the planning commission advised her in writing that her use of the property did not require a conditional use permit.

It is a fundamental precept of zoning that a property owner is entitled to have his property zoned based on proper zoning concepts without regard to the one particular use he might then intend to make of his property. "A zoning authority's insistence on considering the owner's specific use of a parcel of land constitutes not zoning but direct governmental control of the actual use of each parcel of land which is inconsistent with constitutionally guaranteed private property rights." *Porpoise Point Partnership v. St. Johns County, Fla. App.*, 470 So. 2d 850, 851 (1985). Kentucky subscribes to this view. *Fritts v. City of Ashland, supra at* 713; *Pierson Trapp Co. v. Peak, Ky.*, 340 S.W.2d 456, 459 (1960). Yet, the basic premise of the Development Guidance System requires that zoning decisions be based on the proposed specific use of each parcel of property.

> KRS 100.111(6) defines "conditional use" as follows: "'Conditional use' means a use which is essential to or would promote the public health, safety, or welfare in one (1) or more zones, but which would impair the integrity and character of the zone in which it is located, or in adjoining zones, unless

> restrictions on location, size, extent, and character of performance are imposed in addition to those imposed in the zoning regulation."

Obviously, this definition will not work under Hardin County's Development Guidance System, which treats every use, except agricultural or single family residential, as a "conditional use." Thus, the Development Guidance System defines a conditional use as "A use of land or activity permitted only after fulfillment of all local regulations." Stripped to its bare bones, that definition means that a conditional use is a use which is agricultural or single family residential, or which is permitted by the planning commission. Compare, Board of Adjustment and Appeals of *City of Shively v. Dixie Suburban Volunteer Fire Dept.*, [Ky., 320 S.W.2d 109 (1958)] *supra* at 110. The definition of "conditional use permit" has been similarly altered to conform to the uniqueness of the Development Guidance System. A local government has no authority to alter a definition of a term defined in KRS 100.111. *Sladon v. Shawk*, Ky. App., 815 S.W.2d 404 (1991). The ordinance must be drafted to conform to the definition, not vice versa. Since the entire Development Guidance System is predicated upon virtually every use being a "conditional use," and since that term, as defined in KRS 100.111(6), makes no sense when applied in that context, the system is not workable.

Although KRS 100.202(1) permits a zoning ordinance placing all property within a single zone and addressing all land use proposals therein as conditional use permits, that statute does not purport to authorize other deviations from the statutory scheme. Nor can this ordinance be saved by

application of KRS 100.203(1)(3), which authorizes districts of special interest. Whether called "floating zones," *Bellemeade Company v. Priddle*, Ky., 503 S.W.2d 734, 738 (1973), or "planned unit developments (PUD's)," *Cetrulo v. City of Park Hills*, Ky., 524 S.W.2d 628 (1975), it is clear that the special use is pre-approved, i.e., pre-deemed compatible with the location in advance of any individual application for the permitted use. *Bellemeade Company v. Priddle, supra* at 740; Griffin and Becker, Kentucky Law Survey: Zoning, 67 Ky. L.J. 659, 661 (1979). Under the Development Guidance System, no conditional use is pre-deemed compatible with any location prior to an application for a conditional use permit, i.e., zoning without planning.

That, of course, is the fundamental flaw in the Development Guidance System, and it is found in its stated purpose. KRS 100.187 provides that "The comprehensive plan shall contain, as a minimum, the following elements: . . . (2) A land use plan element, which shall show proposals for the most appropriate, economic, desirable, and feasible patterns for the general location, character, extent, and interrelationship of the manner in which the community should use its public and private lands at specified times as far into the future as is reasonable to foresee." (Emphasis added.) Yet, in the forewords to three of the four installments of the comprehensive plan, those dated May 5, 1981, September 1, 1981 and November 10, 1981, it is stated that the purpose of the plan is to "indicate how county government will react when certain events occur, rather than attempt to foresee the future." Treating every use application as a "conditional use" implements that purpose, in direct contravention of KRS 100.187(2). The judicial test to be applied to the validity of a zoning ordinance is whether or not the ordinance bears any

substantial relation to the objects set forth in the statute which specifies the purposes of zoning regulations. *Adams v. City of Richmond, Ky.*, 340 S.W.2d 204 (1960). Throughout the comprehensive plan and in the foreword to the ordinance, itself, the commission has expressed a purpose to avoid traditional zoning concepts and establish a unique system, which, even if deemed to be a better approach to planning and zoning, admittedly bears little if any substantial relation to the objects and purposes established by the enabling act.

Because the Development Guidance System bears no substantial relation to the objects and purposes set forth in KRS chapter 100, it is invalid; thus, the decisions of the Hardin County Planning and Development Commission and the Hardin Fiscal Court denying Jost the right to use her property as an animal refuge center must be vacated.

The County contends that the trial court erroneously declared the development guidance system invalid because there was no assigned use for each area. This is not Judge Cooper's reasoning. Rather, he concluded that the plan must include a more complete definition of the grounds on which a conditional use is to be permitted or denied. He observed that the plan calls for zoning decisions based on the government's reaction to future events rather than present planning for the future. This methodology is in direct contravention of KRS 100.187. We agree.

Moreover, although the ordinance provides that property may be used for purposes other than agricultural and residential, it does not specifically enumerate particular uses and it accordingly establishes no criteria which would justify the granting of a permit for one "conditional" use as opposed

to another use. The conditional use statute from which the ordinance purports to gain its vitality limits uses other than those expressly permitted in a given geographical area to "uses which are specifically named in the zoning regulations." The naked labeling of all uses other than agricultural or residential uses as "conditional uses" leaves land use to the subjective whim and caprice of the zoning authority.

The judgment of the Hardin Circuit Court holding the Hardin County Development Guidance System invalid is affirmed.

ALL CONCUR.

APPENDIX H

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

[Filed January 6, 1995]

93-CA-1099-MR (Direct Appeal)
AND
93-CA-1291 (Cross-Appeal)

HARDIN COUNTY, HARDIN FISCAL COURT, and HARDIN COUNTY PLANNING AND DEVELOPMENT COMMISSION APPELLANTS / CROSS-APPELLEES	)
v.	)
BLUE RIBBON PROPERTIES, INC., d/b/a Long Hollow Landfill APPELLEE/ CROSS-APPELLANT	)

APPEAL AND CROSS-APPEAL
FROM HARDIN CIRCUIT COURT
HONORABLE WILLIAM S. COOPER, JUDGE
ACTION NO. 91-CI-0519

OPINION AFFIRMING

BEFORE: HOWERTON, HUDDLESTON, and JOHNSON, Judges.

HOWERTON, JUDGE. Hardin County, Hardin County Fiscal Court, and Hardin County Planning and Development Commission (the County) appeal from a summary judgment of the Hardin Circuit court declaring the County's planning and zoning ordinance invalid. The judgment also vacated the County's denial of Blue Ribbon Properties, Inc., d/b/a Long Hollow Landfill ("Long Hollow"'s) right to use its property as a solid waste landfill. The County presents four arguments attempting to support its planning and zoning ordinance and a fifth argument that Long Hollow's application for a conditional use permit should be barred under the doctrine of *res judicata*. Long Hollow has also filed a cross-appeal arguing that the hearing process in the County's ordinance violates its procedural due process rights.

Argument in this appeal was heard with the case of *Hardin County v. Joan Jost and Animal Refuge Center, Inc.*, 92-CA-2822-MR. In *Jost*, rendered on the same date as the opinion in this case, we affirmed Judge Cooper's decision that the planning and zoning ordinance was indeed invalid by adopting the essential portions of his opinion. The portion of Judge Cooper's opinion in the case *sub judice* which pertains to the validity of the ordinance is found in Section 6 on pages 12 to 19. That opinion and summary judgment was rendered April 26, 1993. We adopt that portion of Judge Cooper's opinion as the opinion of this Court for purposes of this decision. Judge Cooper's opinion in this case was basically the same as in his earlier opinion rendered in *Jost*. Our opinion in *Jost* and Section 6 of Judge Cooper's opinion

adopted by us in this case are dispositive of the four issues concerning validity of the ordinance.

The issue of *res judicata* is argued because Long Hollow filed its first application for a conditional use permit to operate and construct a landfill at its 339-acre site in Hardin County in February 1989. After facing several setbacks, Long Hollow abandoned its effort in July 1989. A new application was filed October 14, 1989. In 1990, a group of local citizens organized as W.A.S.T.E., Inc., to seek an injunction to prevent the planning commission from conducting further hearings on Long Hollow's application. The injunction was denied, and W.A.S.T.E., Inc. appealed its case to this Court in Case No. 91-CA-2881-MR. The appeal was dismissed on April 23, 1993, by an opinion and order designated "Not to be Published." At no time has the question of *res judicata* for the case at bar been addressed on the merits by this Court or by a Hardin County Circuit Court. Judge Cooper declined to address the issue because the injunction had been denied and the denial had not been reversed or modified on appeal. The issue is simply not properly before this Court, and we decline to address it.

We do note, however, that since the entire planning and zoning ordinance has been declared invalid, no hearings were necessary as a prerequisite to Long Hollow's use of its land. Furthermore, the law is clear that if there have been any substantial changes between the times the first and second applications were made, the doctrine of *res judicata* would not apply as a bar to the second application. *Fiscal Court of Jefferson County v. Ogden*, Ky. App., 556 S.W.2d 899 (1977); *Overruled on Other Grounds, Commonwealth v. Barber*, Ky. App., 643 S.W.2d 892 (1982).

As to Long Hollow's cross-appeal claiming that the hearing process under the County's planning and zoning ordinance and its "Development Guidance System" violated its procedural due process rights, we can only conclude that this issue has become moot.

The opinion and summary judgment of the Hardin Circuit Court is affirmed.

ALL CONCUR.

ATTORNEY FOR APPELLANTS/
CROSS-APPELLEES:

Ken M. Howard
Hardin County Attorney
Elizabethtown, KY

ATTORNEYS FOR APPELLEE/
CROSS -APPELLANT

Jeanne M. Box
Dandridge F. Walton
Frankfort, KY

APPENDIX I

HARDIN CIRCUIT COURT

Civil Action No. 91-CI-519
Division I

[Filed April 26, 1993]

BLUE RIBBON PROPERTIES, INC., d/b/a LONG HOLLOW LANDFILL, *Plaintiff,*	)
vs.	)
HARDIN FISCAL COURT, HARDIN COUNTY, KENTUCKY AND HARDIN COUNTY PLANNING AND DEVELOPMENT COMMISSION, *Defendant.*	)

OPINION AND SUMMARY JUDGMENT

Blue Ribbon Properties, Inc., d/b/a Long Hollow Landfill, brings this action to vacate the decisions of the Hardin County Planning and Development Commission (planning commission) and the Hardin Fiscal Court denying it a conditional use permit to construct and operate a solid waste landfill on a 339 acre tract near Colesburg, Kentucky. The outcome of this case was preordained by the Opinion and Summary Judgment entered August 11, 1992 in Civil Action

No. 91-CI-1554, *Joan Jost, et al vs. Hardin County, et al,* in which Hardin County's planning and zoning scheme was declared invalid. That decision is presently on appeal and logic would seem to mandate an abatement of this action pending the outcome of that appeal. However, the parties have jointly moved for a decision in this case, and this court is required by law to render a decision in any submitted case within ninety days of the date of its submission. KRS 454.350. Much of the language of this opinion will be familiar to those who have read the *Jost* opinion. However, additional issues have been raised in this case which were not raised in *Jost*.

1. The Development Guidance System.

On January 9, 1984 and pursuant to KRS 100.201, et seq., the Hardin Fiscal Court adopted a zoning ordinance for land use regulation in the unincorporated areas of Hardin County. That ordinance, known as the Development Guidance System, is said to be unique in the Commonwealth of Kentucky and, perhaps, in the United States. It admittedly does not follow the traditional approach of establishing separate zones for particular types of development with identifiable permitted and conditional uses. Instead, it designates the entire unincorporated area of the county as one zone, and designates three types of uses for that zone. Agricultural and single family residential uses are designated as "uses-by-right." Uses having a negative impact on the quality and supply of water, or which endanger public health, or historic sites, are designated as "prohibited uses" (as are certain flashing signs). Everything else is designated as a "conditional use." Conditional use is defined as "a use of land

or activity permitted only after fulfillment of all local regulations." Thus, anyone desiring to use his property for any purpose other than agricultural or single family residential use must obtain a conditional use permit. The Development Guidance System contains no provision for a board of adjustment, but vests the traditional functions of that board in the planning commission. Thus, the commission's functions include not only preparation of the comprehensive plan and any amendments, KRS 100.183, KRS 100.197, *City of Lakeside Park v. Quinn*, Ky., 672 S.W. 2d 666 (1984), but also the functions of a traditional board of adjustment, including hearing and deciding applications for conditional use permits. KRS 100.237 (1).

For the purpose of determining whether to grant an application for a conditional use permit, the Development Guidance System first requires application of a "growth guidance assessment." This initial step involves the commission's evaluation of a land use proposal based upon a point system. Points are awarded on the basis of a project's proximity to previously developed areas and related amenities, as well as the suitability of the soil at the proposed site for agricultural purposes. If a Proposal scores 150 points, it is automatically submitted for a "compatibility assessment." If a proposal fails to score 150 points, the planning commission reviews the application in a summary proceeding. If a proposal is rejected at that stage, an applicant may appeal to the commission for further review at a public hearing. If the commission determines that the site is suitable for development despite a score of less than 150 points on the growth guidance assessment, the project is also submitted for a "compatibility assessment."

The compatibility assessment involves an informal compatibility meeting of the applicant, surrounding property owners, and the commission's staff to discuss the proposed development. This procedure is designed to create compromise, and problems relating to the proposed development are discussed and solutions proposed. If no consensus is reached, a public hearing is held, following which the commission decides whether to reject the proposal as incompatible or place conditions on the project in order to make it compatible. If the project is rejected at any stage, the applicant may appeal to the Hardin Fiscal Court for a *de novo* hearing and decision.

2. The Blue Ribbon Properties Application.

On February 2, 1989, Blue Ribbon filed its first application for application for a conditional use permit to construct and operate a solid waste landfill at a 339 acre site on Lower Colesburg Road near the community of Colesburg, Kentucky. Having failed to score 150 points on the growth guidance assessment, the application was initially rejected. Blue Ribbon appealed to the commission for further review and a public hearing. The hearing was conducted on June 6, 1989. At its next regular meeting on June 20, 1989, the commission denied the application. On June 21, 1989, Blue Ribbon appealed the denial to the Hardin Fiscal Court. On July 13, 1989, Blue Ribbon notified the fiscal court that it was withdrawing its appeal.

On October 14, 1989, Blue Ribbon filed a new application for a conditional use permit to construct and operate a solid waste landfill at the same 339 acre site near

Colesburg. Once again, it failed to score 150 points under the growth guidance assessment. Another appeal was taken to the planning commission, which conducted public hearings on December 5 and 19, 1989. On January 16, 1990, the planning commission, which conducted public hearings on December 5 and 19, 1989. On January 16, 1990, the planning commission overturned the growth guidance assessment denial and found the site suitable for development. The application then proceeded to the compatibility assessment phase.

At this point, W.A.S.T.E., Inc., an organization consisting of local citizens opposed to the construction of the Colesburg landfill, filed Civil Action No. 90-CI-131 in Division II of this court seeking an injunction to prevent the planning commission from proceeding with further hearings on Blue Ribbon's application. W.A.S.T.E. claimed that Blue Ribbon's withdrawal of its appeal to the fiscal court from the planning commission's denial of its initial application precluded the subsequent application under the principle of res judicata. Both the planning commission and Blue Ribbon were named as parties to that action. By Orders entered on February 22, 1990 and November 7, 1991, Judge Roark held that the principle of res judicata did not preclude Blue Ribbon's second application for a conditional use permit and denied injunctive relief. That action is presently pending on appeal before the Kentucky Court of Appeals.

The compatibility hearing on Blue Ribbon's second application was scheduled for February 27, 1990. By letter dated February 22, 1990, the planning commission notified Blue Ribbon that the compatibility hearing would not include evidence of a technical geological nature, since the geological

suitability of the site was being investigated by the Cabinet for Natural Resources and Environmental Protection. [Coincidentally with its application for a conditional use permit, Blue Ribbon had also filed an application with the Cabinet to operate a waste disposal facility pursuant to KRS 224.842 (now renumbered as KRS 224.40-305).] Compatibility hearings were held on February 27 and April 17, 1990. Thereafter, nothing occurred until the planning commission notified Blue Ribbon on January 7, 1991 that because the compatibility hearing had not resulted in a consensus, a final public hearing would be held on January 22, 1991. The fiscal court and the planning commission explain in their brief that the delay was due to an executive order by the governor freezing landfill application reviews by state agencies until the subject could be addressed at an extraordinary session of the legislature. A copy of the executive order has not been filed in this record, but the explanation rings true, since the extraordinary session was called and held during the period January 14 through February 22, 1991. Acts 1991, First Extra Session. Regardless, as will be explained *infra*, the delay and the reason therefor are immaterial at this stage of the proceedings.

The first public hearing was held on January 22,1991. On February 5, 1991, the commission voted to deny Blue Ribbon's application in part because "initiation of this project is a prohibitive (sic) use and further does not meet the terms of compatibility as established by the Hardin County Development Guidance System." The commission identified "archaeological concerns" as the basis for finding the application to be a prohibited use; and such factors as "an

unsightly view," "an odor nuisance," and "additional traffic," as bases for its finding of incompatibility.

On February 18, 1991, Blue Ribbon filed an appeal to the Hardin Fiscal Court. A hearing was held on March 4, 1991, and on March 11, 1991, Hardin Fiscal Court denied Blue Ribbon's application for a conditional use permit. Blue Ribbon was notified of the denial by letter dated March 20, 1991.

On April 10, 1991, Blue Ribbon filed this action styled a "Complaint for Declaratory Relief."

3. Appellate Review.

Appeals to circuit court from agencies administering planning and zoning regulations are governed by KRS 100.347. Under section (2) of that statute, any person claiming to be injured or aggrieved by any final action of a planning commission or board of adjustment must file an appeal in circuit court within thirty days of the date that action was final. A panel of our intermediate appellate court once held that KRS 100.347 also applied to final actions of legislative bodies acting upon recommendations of a board or commission. *Musser v. Leon Coal Processing Co.* Ky. App., 560 S.W. 2d 833 (1978). That case was specifically overruled by the supreme court in *Fiscal Court of Jefferson County v. Don Ridge Land Developing Company, Inc.*, Ky., 669 S.W. 2d 922 (1984). It was held in that case that an action brought in circuit court to set aside a decision of a fiscal court either granting or denying a use permit was not governed by KRS Chapter 100, but was a separate remedy against illegal or

unconstitutional actions of a legislative body. That decision is consistent with a prior holding of another court of appeals panel that there is no longer any statutory basis for taking an appeal from fiscal court to circuit court. *Varney v. Varney*, Ky. App., 609 S.W. 2d 704 (1980), interpreting the repeal of KRS 23.030 (1) and enactment of KRS 23A.010 (1). Subsequent to the decision in *Don Ridge, supra*, the legislature enacted KRS 100.347 (3), permitting an appeal to circuit court within thirty days from any final action of a legislative body "relating to a map amendment." Since Blue Ribbon's application was for a conditional use permit and not a map amendment (presumably, there could be no map amendment to a comprehensive plan creating only one zone), KRS 100.347 (3) has no application here. *See also* KRS 100.202 (2); *compare Hunters Ridge Homeowners Association v. Hicks*, Ky. App., 818 S.W. 2d 623 (1991).

The fiscal court had no authority to create an appellate procedure contrary to that authorized by statute. *Fiscal Court of Jefferson County v. Don Ridge Land Developing Company, Inc., supra* at 924. It is unnecessary to determine here what effect should be given a decision of the fiscal court affirming or overturning a decision of the planning commission; but *compare Hacker v. Baesler*, Ky., 812 S.W. 2d 706 (1991), holding that any purported modification of the statutory criteria for a zoning map amendment represents an attempted usurpation of the legislative power of the General Assembly in violation of section 29 of the Constitution. In this case, an appeal from the final action of the planning commission was not filed within thirty days as required by KRS 100.347 (2), thus no issues are preserved for appellate review. *Board of*

Adjustments of City of Richmond v. Flood, Ky., 581 S.W. 2d 1 (1978).

4. Section 2 Review.

Regardless of any right of appellate review, an aggrieved party retains the right to file a separate civil action in circuit court for a remedy against an alleged illegal or unconstitutional action of a legislative body. *Fiscal Court of Jefferson County v. Don Ridge Land Developing Company, Inc., supra* at 924. Interestingly, the opinion in that case refers to the landmark case of *American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Comnmission*, Ky., 379 S.W. 2d 450 (1964) for guidance in formulating the issues in such an action. Interesting, because *American Beauty Homes* was decided in the context of an appeal and not a separate civil action seeking a constitutional remedy. It was suggested in *American Beauty Homes* that new or additional evidence would be admissible even on appeal to show that the decision of the legislative body was based on fraud or bad faith or some other violation of a legal right. 379 S.W. 2d at 457-58. But *American Beauty Homes* also noted that section 2 of the Kentucky Constitution protects our citizens from the exercise of arbitrary power. It then defined arbitrariness in the context of a planning and zoning decision as (1) action in excess of granted powers; (2) lack of procedural due process; or (3) lack of substantial evidentiary support. *Id.* at 456.

Blue Ribbon does not claim that the planning commission acted in excess of the powers granted to it by the Development Guidance System. *Compare Henry v. Parrish*,

307 Ky. 559, 211 S.W. 2d 418 (1948). Nor does Blue Ribbon contend that the commission's decision lacked substantial evidentiary support. It does allege that its right to procedural due process was denied when the commission held multiple hearings on the compatibility assessment over a period of more than a year, then reversed its previous decision approving the application under the growth guidance assessment phase, by finding in part that the proposed use is a prohibited use. Blue Ribbon asserts that the reversal of the previous growth guidance assessment decision was made without notice to Blue Ribbon that the planning commission intended to reconsider its previous decision.

Even if the delay in processing Blue Ribbon's application was not attributable to forces outside of the planning commission's control, i.e., the governor and/or the Cabinet for Natural Resources and Environmental Protection, the claim of delay does not amount to procedural due process of sufficient magnitude to warrant setting aside the decisions of the planning commission and the fiscal court and ordering them to issue Blue Ribbon a conditional use permit. If Blue Ribbon perceived that the planning commission's inaction amounted to recalcitrance, the appropriate remedy was a petition for a writ of mandamus. *Compare Humana of Kentucky v. NKC Hospitals, Inc.*, 751 S.W. 2d 369, 374 (1988); *cf. McKinstry v. Wells*, Ky. App. 548 S.W. 2d 169, 174 (1977). Blue Ribbon's claim that the planning commission reversed its growth guidance assessment decision without notice of its intent to reconsider has even less merit. In the first place, a "prohibited use" decision is outside the scope of the growth guidance assessment, and the archaeological evidence appears not to have been available to

the commission prior to January 16, 1990. Secondly, examination of the memorandum attached to the planning commission's minutes of February 5, 1991 reveals that although archaeological factors were considered, the commission also relied on grounds of traffic congestion, unsightly view and odor nuisance, which are factors relating to the compatibility assessment.

5. Preemption.

Blue Ribbon claims that in the area of solid waste management and disposal, local zoning ordinances are preempted by KRS Chapter 109 (Local Solid Waste Management) and KRS Chapter 224.40-305 through 340 (Waste Permits and Licensing). The issue of preemption arises when the state has occupied the field of prohibitory legislation on a particular subject, *Boyle v. Campbell*, Ky., 450 S.W. 2d 265 (1970), or where there is a fundamental conflict between a local ordinance and a state statute or regulation, *Peoples Gas Company of Kentucky, Inc. v. City of Corbin*, Ky., 625 S.W. 2d 848 (1981). Thus, a local government cannot permit a use under its local zoning regulations which is prohibited by state statute, *Southeastern Displays, Inc. v. Ward*, Ky. 414 S.W. 2d 573 (1967), and cannot prohibit activities which are specifically permitted by state statute. *Thomas v. Commonwealth*, Ky. App., 563 S.W. 2d 491 (1978); *Boyle v. Campbell, supra*. The provisions of KRS Chapters 109 and 224 do not conflict with Hardin County's planning and zoning ordinance. KRS Chapter 109 requires each county or waste management district to establish a local solid waste management plan. Nothing in that chapter could be construed as preempting the county's right to deny

a conditional use permit to a prospective landfill owner under its planning and zoning ordinance. In fact, KRS 109.041 (1) specifically delegates to counties the power to determine how, where and by whom disposal of solid waste shall be accomplished. Of course, that delegation is subject to KRS 224.40-305, et seq., which requires the issuance of a permit by the Cabinet for Natural Resources and Environmental Protection. The status of Blue Ribbon's application for such a permit is unknown; but KRS 224.40-315 (2) (d) subjects any application for a permit to "applicable zoning regulations adopted pursuant to KRS Chapter 100."

6. Validity of the Ordinance.

By its amended complaint, Blue Ribbon claims that the Development Guidance System is invalid per se, *see Board of Adjustment and Appeals of City of Shively v. Dixie Suburban Volunteer Fire Dept.*, Ky., 320 S.W. 2d 109, 111 (1958); and it is correct.

Zoning ordinances are an exercise of the police power of the state, and no subdivision thereof may exercise that power except through a grant made by the people of the state through its legislative branch. *Fowler v. Obier*, 224 Ky. 742, 7 S.W. 2d 219, 223, (1928). It is elementary that to the extent that an ordinance conflicts with a provision of KRS chapter 100, it is invalid. *Hacker v. Baesler*, Ky., 812 S.W. 2d 706, 709 (1991); *Green v. Bourbon County Joint Planning Commission*, Ky., 637 S.W. 2d 626, 629 (1982).

It is clear that in enacting KRS chapter 100, the legislature considered careful planning as a prerequisite of

good zoning. *City of Erlanger v. Hoff*, Ky., 525 S.W. 2d 86, 88 (1976); *City of Louisville v. McDonald*, Ky., 470 S.W. 2d 173 (1971); *Fritts v. City of Ashland*, 348 S.W. 2d 712 (1961). A comprehensive plan must have general application throughout the community, so that the facts to be considered do not relate as such to a particular individual or the status of his property. *McKinstry v. Wells*, Ky. App., 548 S.W. 2d 169, 173 (1977). Zoning must conform to planning, so as to prohibit indiscriminate, ad hoc zoning. *Manlev v. City of Maysville*, Ky., 528 S.W. 2d 726, 728 (1975); *cf. Hines v. Pinchback-Halloran Volkswagen, Inc.*, Ky., 513 S.W. 2d 492, 494 (1974). Thus, in *Kindred Homes, Inc. v. Dean*, Ky. App., 605 S.W. 2d 15 (1979), a comprehensive plan which relegated the entire unincorporated areas of Jessamine County to an agricultural zone, so that modifications could only be made piecemeal, was struck down as contrary to the very theory of zoning. And in *Rockhill v. Township of Chesterfield,* 23 N.J. 117, 128 A. 2d 473 (1956), the supreme court of New Jersey struck down an ordinance almost identical to Hardin County's ordinance, holding that reserving the use of the whole of the area to agricultural and residential use, then providing for all manner of "special uses" was the antithesis of zoning. "It makes for arbitrary and discriminatory interference with the basic right of private property, in no real sense concerned with the essential common welfare." *Id.*, 128 A.2d at 479.

The comprehensive plan should be a plan for orderly growth, and property owners must be able to rely on it when making investments in real estate and for the protection of land values. *Bryan v. Salmon Corp.*, Ky. App., 554 S.W. 2d, 912, 917 (1977). In other words, a person investing in

property ought to be able to look at the comprehensive plan and determine with some degree of reasonable certainty the use to which the property can be put before it is purchased. *Rockhill v. Township of Chesterfield, supra*, 128 A.2d at 480. In striking down certain provisions of the Kentucky Billboard Act, our supreme court declared those provisions void because they failed to put a particular property owner on notice as to whether his property was or was not subject to the statute. *Diemer v. Commonwealth, Transportation Cabinet*, Ky., 786 S.W.2d 861, 865 (1990).

It is a corollary to the notice requirement that a zoning ordinance must contain standards to be used in determining whether to permit or deny a conditional use, so as not to vest absolute and arbitrary power in the administrative agency. *Carlton v. Taylor*, Ky. App., 569 S.W.2d 679, 681 (1978). While application of the growth assessment guidelines can place a prospective property owner on notice as to what uses cannot be made of the property, it cannot tell him with any degree of certainty whether any particular use can be made of the property. Even if the proposed use totals 150 points under those guidelines, the use still can be denied if enough neighbors can convince the planning commission members that the use is "incompatible" with their neighborhood.

The growth assessment guidelines simply do not apply to a proposed use of property as a landfill. Points are awarded according to the proximity of the proposed use to a developed or growth area, the antithesis of how points ought to be awarded when considering an application to construct and operate a landfill. Presumably, that is why the planning commission decided to ignore the growth guidance assessment

of Blue Ribbon's application and pass it on for a compatibility assessment. As a result, no standard was applied to Blue Ribbon's application except whether the proposed landfill was compatible with the neighborhood. But basing zoning decisions solely on the complaints of neighbors ignores the basic premise fo planning and zoning. "The effect of a zoning change on the value of neighboring property is only one factor to be considered, and the purpose of zoning is not to protect the value of the property of particular individuals, but rather to promote the welfare of the community as a whole." *Fritts v. City of Ashland*, Ky., 348 S.W.2d 712, 714 (1961). In *Geo-Tech Reclamations Industries, Inc. v. Hamrick*, 886 F.2d 662 (4th Cir. 1989), an ordinance which subjected a landfill application to adverse public sentiment, thereby necessarily making the decision making process subservient "to selfish or arbitrary motivations or the whims of local taste," was held invalid. "The potential that . . . sensitive administrative decisions regarding waste disposal will be made by mob rule is too great to ignore." *Id.* at 667.

It is a fundamental precept of zoning that a property owner is entitled to have his property zoned on the basis of proper zoning concepts without regard to the one particular use he might then intend to make of his property. "A zoning authority's insistence on considering the owner's specific use of a parcel of land constitutes not zoning but direct governmental control of the actual use of each parcel of land which is inconsistent with constitutionally guaranteed private property rights." *Porpoise Point Partnership v. St. John's County*, Fla. App., 470 S.W.2d 850 851 (1985). Kentucky subscribes to this view. *Fritts v. City of Ashland, supra* at 713; *Pierson Trapp Co. v. Peak*, Ky., 340 S.W.2d 456, 459

(1960). Yet, the basic premise of the Development Guidance System requires that zoning decisions be based on the proposed specific use of each parcel of property.

KRS 100.111(6) defines "conditional use" as follows:

> "'Conditional use' means a use which is essential to or would promote the public health, safety, or welfare in one (1) or more zones, but which would impair the integrity and character of the zone in which it is located, or in adjoining zones, unless restrictions on location, size, extent, and character of performance are imposed in addition to those imposed in the zoning regulation."

Obviously, this definition will not fit within the framework of Hardin County's Development Guidance System, which treats every use, except agricultural or single family residential, as a "conditional use." Thus, the Development Guidance System defines a conditional use as "A use of land or activity permitted only after fulfillment of all local regulations." Stripped to its bare bones, that definition means that a conditional use is a use which is agricultural or single family residential, or which is permitted by the planning commission. *Compare Board of Adjustments and Appeals of City of Snively v. Dixie Suburban Volunteer Fire Dept.*, Ky., 320 S.W.2d 109, 110 (1958). The definition of "conditional use permit" has been similarly altered to conform to the uniqueness of the Development Guidance System. A local government has no authority to alter a

definition of a term defined in KRS 100.111. *Sladon v. Shawk*, Ky. App., 815 S.W.2d 404 (1991). The ordinance must be drafted to conform to the definition, not vice versa. Since the entire Development Guidance System is predicated upon virtually every use being a "conditional use," and since that term, as defined in KRS 100.111(6), makes no sense when applied in that context, the system is not workable.

Although KRS 100.202(1) permits a zoning ordinance placing all property within a single zone and addressing all land use proposals therein as conditional use permits, that statute does not purport to authorize other deviations from the statutory scheme. Nor can this ordinance be saved by application of KRS 100.203(1)(e), which authorizes districts of special interest. Whether called "floating zones," *Bellemeade Company v. Priddle*, Ky., 503 S.W.2d 734, 738 (1973), or "planned unit developments (PUD's)," *Cetrulo v. City of Park Hills*, Ky., 524 S.W.2d 628 (1975), it is clear that the special use is pre-approved, *i.e.*, pre-deemed compatible with the location in advance of any individual application for the permitted use. *Bellemeade Company v. Priddle, supra* at 740; Griffin and Becker, *Kentucky Law Survey: Zoning*, 67 Ky. L.J. 659, 661 (1979). Under the Development Guidance System, no conditional use is pre-deemed compatible with any location prior to an application for a conditional use permit, *i.e.*, (zoning without planning.)

That, of course, is the fundamental flaw in the Development Guidance System, and it is found in its stated purpose. KRS 100.187 provides that "The comprehensive plan shall contain, as a minimum the following elements: . . . (2) A land use plan element, which shall show proposals for

the most appropriate, economic, desirable, and feasible patterns for the general location, character, extent, and interrelationship of the manner in which the community should use its public and private lands at specified times *as far into the future as is reasonable to foresee*." (Emphasis added.) Yet, in the forewords to three of the four installments of the comprehensive plan, those dated May 5, 1981, September 1, 1981 and November 10, 1981, it is stated that the purpose of the plan is to "indicate how county government will react when certain events occur, rather than attempt to foresee the future." Treating every use application as a "conditional use" implements that purpose, in direct contravention fo KRS 100.187 (2). The judicial test to be applied to the validity of a zoning ordinance is whether or not the ordinance bears any substantial relation to the objects set forth in the statute which specifies the purposes of zoning regulations. *Adams v. City of Richmond*, Ky., 340 S.W. 2d 204 (1960). Throughout the comprehensive plan and in the foreword to the ordinance, itself, the commission has expressed a purpose to avoid traditional zoning concepts and establish a unique system, which, even if deemed a better approach to planning and zoning, admittedly bears little if any substantial relation to the objects and purposes established by the enabling act.

Because the Development Guidance System bears no substantial relation to the objects and purposes set forth in KRS chapter 100 it is invalid.

7. Res Judicata.

The planning commission and the fiscal court assert that even if the Development Guidance System is invalid,

Blue Ribbon is precluded from raising the issue by the principle of res judicata. This claim is premised on Blue Ribbon's withdrawal of its appeal from the denial of its original application. This is the same issue raised in Civil Action No. 90-CI-131 and the analysis of the statutes and case law in the opinion and Order of November 7, 1991 is well reasoned and has equal application here. Blue Ribbon and the planning commission were parties to Civil Action No. 90-CI-131 and had an opportunity to litigate this issue in that case. Until the Order of November 7, 1991 is reversed or modified, it is, itself, res judicata with regards to the res judicata issue raised by the planning commission in this case. *Vaughn's Adm'r v. Louisville & N.R. Co.*, 297 Ky. 309, 179 S.W.2d 441 (1944). It is immaterial that Blue Ribbon and the planning commission were co-defendants in that case, so long as they were and are asserting adverse positions. *Id.*, 179 S.W.2d at 444. The planning commission is an agency of the fiscal court, which has the same interest and takes the same position on this issue. Thus, res judicata also precludes the fiscal court from relitigating the issue. Thus, res judicata also precludes the fiscal court from relitigating the issue. *Commonwealth ex rel. Dummit v. Jefferson County*, 300 Ky. 514, 189 S.W.2d 604, 606 (1945).

8. Failure to Raise the Issue at the Administrative Level/Estoppel.

The planning commission and fiscal court assert that Blue Ribbon is precluded from challenging the validity of the ordinance in this action, because it did not challenge its validity in the proceedings before the planning commission. As a basic premise, the failure to raise an issue at the

administrative level precludes raising that issue on appeal. *Personal Board v. Heck*, Ky. App., 725 S.W.2d 13 (1986). Of course, this is not an appeal; and the principle does not apply to an independent action challenging the validity or applicability of a statute or ordinance creating the administrative agency. *Harrison's Sanitarium, Inc. v. Commonwealth, Department of Health*, Ky., 417 S.W.2d 137 (1967).

Expanding on this argument, the planning commission and the fiscal court argue that Blue Ribbon is estopped from relying on the invalidity of the entire ordinance, since the issue was first raised in its amended complaint of September 10, 1992. *Bowling Green-Warren County Airport Board v. Long*, Ky., 364 S.W.2d 167, 170 (1962) states the principle that one who recognizes an ordinance and treats it as in force for a period of years may, under the circumstances, be precluded from challenging its validity. However, estoppel was held not to apply in that case, because the parties against whom it was asserted had never acquiesced in the purported zoning or in the imposition of the ordinances and regulations on their property. The county judge/executive has testified in this action that the fiscal court relied on the denial of Blue Ribbon's application in adopting its solid waste management plan pursuant to KRS Chapter 109 and in executing certain options to purchase property necessary to establish its own proposed landfill at Pearl Hollow. The fiscal court must have known that Blue Ribbon was asserting in this action that the ordinance was at least invalid insofar as Blue Ribbon's application was concerned. Thus, it could not have relied on the denial of Blue Ribbon's application until and unless this action was favorable concluded on all issues. In fact, it seems

almost incongruous for the fiscal court to deny Blue Ribbon's application, then claim that Blue Ribbon is estopped from asserting that it had no right to do so. It is noted in passing that, unlike Blue Ribbon, the fiscal court is not required to satisfy the prohibited and conditional use provisions of its own planning and zoning ordinance before establishing a county-owned landfill. KRS 100.361(2); *Edelen v. Nelson County*, Ky. App., 723 S.W.2d 887 (1987).

9. Section 1983 Claim.

In its amended complaint, Blue Ribbon asserts a claim under Title 42, section 1983 of the United States Code that the fiscal court has violated its civil rights by using an invalid ordinance to deny it the right to use its property as a landfill. Section 1983, et seq., permits recovery of compensatory damages, as well as costs and attorney's fees. 42 U.S.C. section 1988. Section 1983 provides as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress."

The United States Supreme Court has held that the word "person" in section 1983 was not intended to include states or to override the common law immunity of the various states from being sued without their consent; and that a state is not subject to liability for damages in an action brought under this section in a state court. *Hafer v. Melo*, 502 U.S. ___, S.Ct. ___, 116 L.Ed.2d 301 (1991); *Will v. Michigan*, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). Blue Ribbon's reliance on *Monell v. New York City Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) is misplaced. In that case, the defendant was a municipality, not a state. In Kentucky, sovereign immunity extends to counties as political subdivisions of the state. *Moores v. Fayette County*, Ky., 418 S.W.2d 412 (1967); *Cullinan v. Jefferson County*, Ky., 418 S.W.2d 407 (1967). While the identification of those state agencies which are entitled to the protection of sovereign immunity is undergoing some modification, *Calvert Investments, Inc. v. Louisville & Jefferson County Metropolitan Sewer District*, Ky., 805 S.W.2d 133, 137 (1991), *Kentucky Center for the Arts Corp. v. Berns*, Ky., 801 S.W.2d 327, 331 (1990), a county government performing a purely governmental function does not appear to be on the endangered list. *Calvert Investments, supra* at 138.

Even if that were not so, the allegations in Blue Ribbon's amended complaint are insufficient to state a claim under section 1983. Blue Ribbon does not claim, *e.g.*, that the fiscal court deliberately enacted an invalid planning and zoning ordinance, or that it deliberately denied Blue Ribbon's application in order to eliminate the competition from the landfill business. The attempted enforcement of an invalid

ordinance in this case could be characterized at best as a mere lack of due care. Lack of due care will not support a section 1983 claim. The deprivation of constitutional rights anticipated by section 1983 requires a deliberate act. *Daniels v. Cannon*, 474 U.S. 344, 106 S.Ct. 668, 88 L.Ed.2d 662 (1986).

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED as follows:

1. The Development Guidance System used as a method for planning and zoning in Hardin County, Kentucky, is declared invalid;

2. The decisions of the Hardin County Planning and Development Commission and the Hardin fiscal Court denying Blue Ribbon Properties, Inc. the right to use its property as a solid waste landfill under color of authority of Hardin County's planning and zoning ordinance are vacated;

3. This judgment does not address the authority of Hardin Fiscal Court to control the control the construction and use of solid waste management facilities under KRS Chapter 109 or any other appropriate statutory authority;

4. The Plaintiff's claims for damages under 42 U.S.C. section 1983 are dismissed.

This 26 day of April, 1993.

Circuit Court Opinion and Summary Judgment - 4/26/93

/s/ _____
Judge, Hardin Circuit Court
Division I

Entered April 26, 1993
Attest: Ralph Baskett, Clerk
Hardin Circuit Court

By_____ D.C.

APPENDIX J

PART 1

OF THE HARDIN COUNTY

SOLID WASTE MANAGEMENT PLAN

October 1, 1991

FINAL COMMENT AND
PLAN RECOMMENDATION

[p. 1081]... An estimate of Hardin County's solid waste management areas long range need for solid waste facilities is necessarily guided by the fact that the current Hardin County Landfill (Permit No. 047.02) is scheduled to begin closure stage on July 1, 1992, and thus will no longer be accepting solid waste. The fact remains that an application by Blue Ribbon Properties, Inc. to construct a municipal solid waste landfill in the Colesburg area of Hardin County has been denied by the Hardin County Planning Commission and the Hardin County Fiscal Court as an inappropriate land use at that particular site, therefore neither the current Hardin County Landfill nor the proposed landfill by Blue Ribbon Properties, Inc. is a viable or feasible alternative or solution for the soldi waste needs for the next 5, 10 and 20 year periods.

APPENDIX K

PART 2

OF THE HARDIN COUNTY

SOLID WASTE MANAGEMENT PLAN

January 01, 1993

Revised March 23, 1993

[p. 18]... 3. LOCAL DISPOSAL CAPACITY NEEDS FOR TEN YEARS.

A. Assurance For Area Municipal Solid Waste

Hardin County realizes that preparing an application, permitting and construction of a solid waste landfill takes time. Prior to the opening of the new contained and C/D facility operated by Hardin County Government, the Outer Loop Landfill (056.28) and the Ohio County Landfill (092.00010) have agreed to accept solid waste from Hardin County. Their current life expectance is + 25 years and 20 years respectively, based upon information provided by both facilities. Appropriate letters and required documentation are attached under Addendum 2.

1) Assurance letter from Outer Loop landfill that they will accept our waste and statement of future capacity.

2) Letter from appropriate governing body (Jefferson County 109 Board).

3) Copy of facilities permit displaying Hardin County as a waste source.

4) Future capacity assurance.

5) Assurance letter from Ohio County Landfill that they will accept our solid waste and statement of future capacity. Appropriate documents are attached which display the above referenced information under Addendum 3.

5) The new Hardin County facility is anticipated to be a regional facility which, at this time, is being designed to provide 11 million cubic yards of air space for solid waste. This facility will meet the solid waste disposal needs of the neighboring counties anticipated to join the Hardin County Solid Waste Management Area for the next 10 years.

[p. 19] The site provides many advantages in light of excellent geology, tremendous capacity, sparse local population...potential for access from the Bluegrass Parkway and its relationship to the states population centers.

Pending Application of Longhollow Landfill - The County recognizes that an application has been submitted by Blue Ribbon Properties, Inc. under the name of Longhollow Landfill. This facility has been proposed to be located within Hardin County. Longhollow Landfill is not to be considered as an option for waste disposal within the county. The Hardin

County Planning and Development Commission has denied an application for this land use due to the fact that it does not meet the criteria established by the planning unit. In addition, the Hardin County Fiscal Court has denied Longhollow Landfill as an acceptable land use under a review of the planning process.

As we understand, Longhollow Landfill continues to be reviewed by the Division of Waste Management, regardless of the fact that local determination had not been provided by the Hardin County Governing Body. In fact, Longhollow Landfill has not requested such local determination.